

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

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LULA WILLIAMS, et al., on behalf	:	
of themselves and all individuals	:	Civil Action No.
similarly situated	:	3:17CV461
vs.	:	
BIG PICTURE LOANS, LLC, et al.	:	
	:	
and	:	July 22, 2020
	:	
RENEE GALLOWAY, et al., as	:	
individuals and as representatives	:	
of the classes	:	Civil Action No.
vs.	:	3:18CV406
BIG PICTURE LOANS, LLC, et al.	:	
	:	

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COMPLETE TRANSCRIPT OF THE EVIDENTIARY HEARING

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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**VOLUME 2 OF 2**

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United States District Court

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P R O C E E D I N G S

THE CLERK: Case number 3:17CV461, Lula Williams, et al., versus Big Picture Loans, LLC, et al., and case number 3:18CV406, Renee Galloway, et al., versus Big Picture Loans, LLC, et al. The plaintiffs are represented by Leonard Bennett, Kristi Kelly, Amy Austin, and Kevin Dillon. The defendant Matt Martorello is represented by Richard Scheff, John Erbach, Michael Witsch, and Doug Marsh. Are counsel ready to proceed?

MR. BENNETT: Plaintiffs are, Your Honor.

MR. SCHEFF: Yes, Your Honor.

MR. BENNETT: Your Honor, may I remove my mask?

THE COURT: Please do. Do you have the same people on the telephone that were on yesterday?

THE CLERK: Yes, sir. The sheet is to your right.

THE COURT: All right. But Casey Nash is not on the phone; is that right?

THE CLERK: Correct.

THE COURT: So Hollis, Brewer, Scofield, Marchiando, Guzzo. All right, Ms. Austin is here.

MS. AUSTIN: Good morning, Your Honor. I apologize.

MR. DILLON: Good morning, Your Honor. I apologize, too.

THE COURT: Everything ready to go?

MR. BENNETT: Yes, Your Honor --

1           THE COURT: When I left yesterday, I was told that I  
2 shorted you the promised four hours by not giving you  
3 40 minutes, and then I realized you said 3:40, so there was  
4 20 minutes left on your time, and I've given you 30 minutes,  
5 and you have -- notwithstanding your effort to negotiate it to  
6 a higher figure. Are you ready to proceed on that schedule?

7           MR. BENNETT: Yes, except there is a housekeeping,  
8 agreed housekeeping matter to discuss.

9           THE COURT: All right, housekeeping will be  
10 discussed.

11          MR. BENNETT: So yesterday afternoon or after we  
12 left, rather, we received the defendant's intended deposition  
13 presentations for today.

14          THE COURT: You're going to video them.

15          MR. BENNETT: Videos. And we had an opportunity  
16 overnight to go through them and this morning to go through  
17 them. A number of the provisions we had objected to. The  
18 proposal that I made to my opposing counsel, to Mr. Scheff,  
19 this morning and as I understand to which he has agreed is that  
20 we will not prosecute those objections.

21          The Court can determine the relevance or usefulness  
22 of the evidence because we don't want to interrupt the flow of  
23 the video presentations and insert an hour-long argument about  
24 objections.

25          In lieu of our prosecution of those evidentiary

1 objections, Mr. Scheff and his client have agreed that we can  
2 put on roughly 20 minutes of counter designations to the part  
3 of the depositions that Mr. Scheff is presenting without that  
4 counting against our time. Of course, the Court has the say.

5 THE COURT: That's agreeable to you, Mr. Scheff?

6 MR. SCHEFF: It is, Your Honor.

7 THE COURT: When counsel agree to reasonable things,  
8 I think it's obligatory on the Court to abide by the reasonable  
9 judgments of informed counsel, and we'll proceed in that  
10 fashion.

11 MR. SCHEFF: Thank you, Your Honor.

12 THE COURT: And I thank you all for working things  
13 out. That's the way things ought to go in the practice of law.  
14 In the face of zealous advocacy, reason in approaching problems  
15 is, nonetheless, critically important to the operation of the  
16 system. And I benefit from it, and so do your clients, so I'm  
17 grateful.

18 Mr. Martorello, I'll remind you you are under the  
19 same oath that you took yesterday, sir.

20  
21 **MATTHEW MARTORELLO,**  
22 a witness, called at the instance of the plaintiff, having  
23 been previously duly sworn, testified as follows:

24  
25 THE COURT: All right, Mr. Bennett, you may proceed.

1 MR. BENNETT: And, Your Honor, I'm going to be brief  
2 here so we can reserve a couple minutes to cross-examine, as  
3 necessary, Mr. Martorello when he's presented by the defendant.  
4

5 DIRECT EXAMINATION

6 BY MR. BENNETT: (resuming)

7 Q Mr. Martorello, we talked yesterday about a number of  
8 statements of fact that you made in your original declaration.  
9 You represented in your declaration that you had no involvement  
10 with the creation of Red Rock. Is that still your testimony  
11 today?

12 A Yes.

13 Q And you represented that you had no involvement in the  
14 creation of Big Picture. Is that also still your testimony  
15 that you would offer to the Court today?

16 A It is.

17 Q You represented that notwithstanding what the service  
18 agreement says and the testimony regarding debt collection,  
19 that your companies had no involvement in the collection of  
20 money from consumers. That's still your testimony?

21 A I can't remember exactly what the provision said, but I  
22 believe it was still accurate.

23 Q Okay. And you testified --

24 THE COURT: Wait a minute. You believe what you said  
25 yesterday was still accurate? You left with the impression --

1 the "it" was an indefinite pronoun, and its antecedent noun was  
2 the provision in the agreement, so your statement that you just  
3 made is, I believe the statement in the agreement, in the  
4 contract is still an accurate statement, but yesterday you said  
5 it wasn't accurate. So I want to make sure I know what your  
6 answer is. Is your testimony about that section of the  
7 agreement still as it was yesterday?

8 THE WITNESS: I believe both, I testified it  
9 accurately yesterday.

10 THE COURT: What?

11 THE WITNESS: I believe I testified accurately  
12 yesterday.

13 THE COURT: Okay.

14 Q And that testimony that you offered yesterday is that your  
15 company was involved in debt collection or coordinating with  
16 the debt collector; correct?

17 A We were -- my testimony was that we identified debt  
18 collection agency for the tribe to sell its bad debt, past due  
19 loans to them for collection.

20 Q And you were involved --

21 THE COURT: Excuse me a minute. When you all use --  
22 the word collection has at least two different meanings that  
23 are relevant here. One is the actual collecting of money from  
24 someone who owes a debt and receiving it in the tills of the  
25 entity, and that's collecting. I'm collecting the payments

1 that are due me every month.

2           There is collection in another sense and collection  
3 in the context of this business, and it's been -- the other  
4 sense is that I am a debtor, I am owed -- I am in default;  
5 therefore, collection efforts are made to forcibly collect the  
6 money from me either -- or by legal means. And I'm not sure  
7 what you all are talking about in each -- you seem to be at one  
8 point in time talking about the receipt of the loan payments  
9 and another point in time implementing formal collection  
10 efforts for those who are in default, and I'm not sure -- you  
11 are somehow going to have to differentiate between the meanings  
12 of collections that we're talking about. Do you understand me?

13           MR. BENNETT: I do. I've tried -- really there are  
14 three aspects of this.

15           THE COURT: That's fine, but you cover them  
16 separately then so I understand you're not commingling. What's  
17 the third one?

18           MR. BENNETT: One is the receipt of money, the  
19 other --

20           THE COURT: In the ordinary course.

21           MR. BENNETT: Ordinary course into the operating  
22 account, and that's about what the service agreement says.  
23 Service agreement says --

24           THE COURT: Stop. Do you agree that that is the kind  
25 of collection that is referred to in the paragraph of the



1 service agreement that we're talking about, Mr. Martorello, the  
2 receipt of money from those who owe it to the lending  
3 institution?

4 THE WITNESS: Yes, I believe that is correct.

5 THE COURT: All right. All right, now, Mr. Bennett,  
6 there's another one.

7 MR. BENNETT: And in that regard, just to make sure  
8 that we have --

9 THE COURT: Do you need the system on? Is it on?  
10 There's nothing on the televisions.

11 MR. BENNETT: So this, we're talking about Exhibit 11  
12 which is the original service agreement, and we're talking  
13 about paragraph 4.9.

14 Q This was in your service agreement. In fact, this  
15 paragraph was in every iteration of the service agreements that  
16 you had with Red Rock; correct?

17 A That's correct.

18 Q All right. Servicer --

19 THE COURT: Red Rock and Big Picture?

20 MR. BENNETT: Well, this was not in the service  
21 agreement --

22 THE COURT: This is just Big Picture --

23 MR. BENNETT: This is just Red Rock.

24 Q "Servicer will collect all gross revenue and all  
25 proceeds"; correct?

1 A That's what it says.

2 Q When you say your company -- in your declaration, you say  
3 your company didn't collect. What you mean is in a legal  
4 standpoint -- from a technical contract perspective in -- the  
5 actual collection was done in the name of the tribe; right?  
6 The receipt of the revenue was done into the operating account,  
7 and that operating account was in the name of the tribe.

8 A Are you asking me what my testimony was?

9 THE COURT: No, he's asking you what you mean by the  
10 word -- he's asking you what you mean when you say in paragraph  
11 26 "I have never taken any action to collect in whole or in  
12 part any consumer loan originated by Red Rock," and then you  
13 said yesterday that included you, Bellicose, and Sourcepoint.  
14 So he's asking you what you mean by the word collect in that  
15 sentence.

16 THE WITNESS: Thank you. It was your interpretation,  
17 Your Honor, the collection of unlawful debt, the ordinary  
18 course of taking or receiving money into the bank account.  
19 That's what I was talking about.

20 THE COURT: Of lawful then? The collection of lawful  
21 debt. Is that what you said?

22 THE WITNESS: The allegation was collection of an  
23 unlawful debt, and so to your point, the first interpretation  
24 of collection, which does mean many things, the ordinary course  
25 of receiving payments. That's what I'm talking about.

1 THE COURT: I understand.

2 Q And this was into a bank account that the tribe did not  
3 have a signator authorized to take money out of?

4 A I testified that I was the signer --

5 Q Is that yes or no?

6 THE COURT: Wait just a minute. Let me start again.  
7 You started that sentence with what word?

8 MR. BENNETT: Yes, sir. I'll rephrase the question.

9 THE COURT: I don't know if he can understand it, but  
10 I can tell you I didn't understand it. For today's purposes,  
11 it's important that both of us understand it. So rephrase your  
12 question and put some specificity to it so I can follow along.

13 Q So your interpretation in your declaration of the process  
14 of collection is the payment of money by consumers in the  
15 ordinary course into the operating account of Red Rock.

16 A No. That's inaccurate. It's the other side of the  
17 equation. It's not the payment but the actual taking or  
18 receiving of the payment on the lender's side like the Judge  
19 just described.

20 Q Understood. And the taking and receiving is the payment  
21 by consumers into the operating account in the name of Red  
22 Rock?

23 THE COURT: What you mean is what are you taking and  
24 receiving. Answer, you are taking and receiving the payment  
25 from the consumer; right so far?

1 THE WITNESS: Correct.

2 THE COURT: The next part of the question is into  
3 what account does that payment go. What's the answer?

4 THE WITNESS: Red Rock Tribal Lending.

5 THE COURT: Red Rock what?

6 THE WITNESS: The Red Rock bank account, the tribe's  
7 bank account.

8 THE COURT: Now we're at the point we're talking  
9 about payments from the consumers that go into the Red Rock  
10 Tribal Lending operating account; is that right?

11 THE WITNESS: Yes, sir.

12 THE COURT: What's your next question?

13 Q So that was an operating account that so long as it was  
14 open, you don't recall any time in which a tribal member was  
15 the signator on the Red Rock operating account.

16 A No, I don't recall any time that any tribal member was on  
17 the account.

18 Q And during the entire time that you recall, only you and  
19 your employees were authorized on that account.

20 A Yes, that is accurate.

21 Q Now, I want to go to an area that we talked maybe too much  
22 about. This is your paragraph 69 of your declaration where you  
23 represent that the decision to sell Bellicose was not motivated  
24 by impending threats of litigation or enforcement actions.

25 Now, your explanation as to why that's not untrue is

1 because you are breaking down the sale discussions into two  
2 discrete time periods; one, you are asserting the 2012, '13,  
3 and '14, that proposed sale of your assets, that didn't go  
4 anywhere. You would agree that that was motivated -- certainly  
5 a significant motivation was your fear of impending litigation  
6 and government action.

7 A The one you are specifically talking about starting in  
8 2012, 2013, that was not.

9 THE COURT: That was not what?

10 THE WITNESS: Motivated by regulatory threat or  
11 impending litigation. That's the one you are specific asking  
12 about, no.

13 Q What time period were you motivated to try to sell the  
14 assets to the tribe because of impending government regulation  
15 or action and/or threat of litigation?

16 A The sort of, I guess, second arrangement that I had  
17 hypothesized was to sell the 40 -- 51 percent equity in a  
18 ten-year deal, and that was in September 2013. I'm sorry,  
19 October 2013, and that was at the height of Operation Choke  
20 Point and the Otoe-Missouria district court ruling when I  
21 proposed that. So that I am saying was motivated by the  
22 pressures around the industry at that time.

23 Q And the Otoe ruling and the Second Circuit affirmance,  
24 that occurred in October 2014; correct?

25 A Second Circuit -- yes, that was October 2014.

1 Q And let's take a look at Exhibit 93.

2 THE COURT: Are you saying there's a third -- you're  
3 really saying there were three tries to sell this thing; is  
4 that right? One was in 2012/'13, it didn't go anywhere. Then  
5 the next one was the second arrangement, 51 percent,  
6 October 2013, it didn't go anywhere, and then there's the one  
7 that did go?

8 THE WITNESS: That's very close.

9 THE COURT: Is that right? You keep talking about --  
10 yesterday you said a couple of times there were three different  
11 efforts to effectuate the sale. Just for my purposes before he  
12 gets to Exhibit 93, when was the third? I understand when the  
13 first two were. When was the third?

14 THE WITNESS: The third one was August 2014.

15 THE COURT: And that was the one that worked.

16 THE WITNESS: That's correct. That's the one that  
17 ultimately worked.

18 THE COURT: I'm going to call that this sale for  
19 purposes of a quick reference, and the other two were aborted  
20 sales. Aborted sale one was 2012/'13, aborted sale two was  
21 October 2013.

22 THE WITNESS: Correct.

23 THE COURT: Am I correct in framing it that way?

24 THE WITNESS: Yes. The only distinction would be the  
25 first aborted sale was to sell a copy of our IP, our secret

1     sauce, to the tribes, and then we would get a seven-year  
2     consulting agreement to help build their own tribal servicing  
3     agency. So it was very different. We weren't selling our  
4     assets. We were trying to re-create who we were for the tribe  
5     to own in an urban center where they could service themselves  
6     with MBAs, Ph.D.s, and statisticians and such for their own  
7     ownership.

8             THE COURT: So 2012/'13, first aborted sale was not  
9     an asset sale, it was an IP sale, and then you would have  
10    replicated what you were selling, and it would be -- that's  
11    what the tribe would get out of the sale.

12            THE WITNESS: Yes.

13            THE COURT: The second aborted was an asset sale in  
14    the sense that it was a 51 percent ownership interest.

15            THE WITNESS: Correct.

16            THE COURT: And the third one was the sale of the  
17    whole shooting match?

18            THE WITNESS: Yes, sir. Yes, Your Honor.

19            THE COURT: Thank you very much. Excuse me, Mr.  
20    Bennett. I interrupted you and Exhibit 93.

21            MR. BENNETT: Let's go to his declaration instead,  
22    Your Honor.

23            THE COURT: All right.

24    Q     Mr. Martorello, this whole -- there were three distinct  
25    sale periods is nowhere in your declaration at all; right?

1 A No, I did not elaborate on it here.

2 Q Elaborate on it?

3 THE COURT: Now, now, now, don't get argumentative.

4 MR. BENNETT: Yes, sir.

5 THE COURT: Remember the old way to do it.

6 Q Will you take a look at paragraph -- let's start actually  
7 with paragraph 47, and the heading is the sale of Bellicose to  
8 LVD. Now, first, yesterday we went through some of the emails  
9 where you discussed positions that you were taking with your  
10 valuation companies at different stages.

11 A Yes.

12 Q And would you agree with me that you believe that in the  
13 business, it's okay to change your truth based on who is  
14 listening and who is reading?

15 A No, I disagree.

16 Q So there's one truth?

17 A There's one truth.

18 Q There's the truth that you tell the Court, there's the  
19 truth that you tell the Court two years ago, there's the truth  
20 that you tell your investors, the truth that you told the  
21 tribe. One truth, you agree with that.

22 A The truth is the truth.

23 Q And you agree you have taken different truth positions in  
24 some documents we've been through depending whether you're  
25 talking to Wells Fargo, whether you're talking to the tribe,



1 whether you're talking to your valuation people?

2 A I disagree.

3 Q Well, let's talk about your declaration. Your explanation  
4 is that this sale process starting in 2012 did not -- was not a  
5 fluid ongoing process; right? It was three discrete time  
6 periods. That's what your testimony moments ago was.

7 A It was three discrete time periods, but it was fluid in  
8 the sense that the tribe always wanted that discussion since  
9 2012, and I tried to find things that might accommodate them.

10 Q Sure. So paragraph 49, take a look at it, please.

11 A I'm sorry, did you say 47 or --

12 Q 49. Start with 49. 49 says, "To that end," that is the  
13 end of trying to help the tribe, your objective you claim,  
14 "since at least 2012, LVD and I have engaged in multiple  
15 conversations relating to the potential sale of my consulting  
16 businesses to LVD." Do you see that?

17 A Yes, sir, I do.

18 Q And this was to accelerate, according to your paragraph,  
19 LVD's ability to maintain a profitable online consumer lending  
20 business with no outsourced consulting services; do you see  
21 that?

22 A Yes.

23 Q So the next paragraph, 50, please, you see you write, "As  
24 a result of these discussions" -- that is the discussions that  
25 began in 2012 to try to sell your business. As a result of

1 these discussions, you were aware that on or about February 15,  
2 LVD transformed its tribal lending business infrastructure to  
3 prepare to purchase Bellicose and ensure protections for LVD  
4 including liability limitations. Did you write those two  
5 paragraphs, or did your lawyers?

6 A I believe that -- I mean, I don't know perfect knowledge  
7 here, but I believe that I would have written that.

8 Q So when you were writing this in 2017 to support a motion  
9 to dismiss for the tribe, you suggested in those paragraphs  
10 that this was one ongoing process beginning in 2012 and  
11 culminating in February 2015. That's what you told the Court  
12 in 2017; correct?

13 A I said the result of these discussions. That was pretty  
14 general. It wasn't referring to IP sale in 2012. I don't  
15 understand the question, I guess.

16 Q Okay. You have the declaration in front of you.

17 A Yes.

18 Q Where in that declaration in any regard do you suggest  
19 this three time periods of trying to sell the business to the  
20 tribe?

21 A That detail is not in the declaration.

22 Q And, in fact, you would agree with me that any person  
23 reading this, without the benefit of your new position today,  
24 would conclude that this was a seamless process starting in  
25 2012, ending in February of 2015?

1 A I'm sorry. By seamless you mean there were no stops and  
2 starts?

3 Q That it was one process, negotiation that culminated in  
4 what we see in 2015.

5 A I guess someone could read it that way. Yeah, it's  
6 possible someone could read it that way.

7 Q Now, take a look at Exhibit 93, please.

8 A I said multiple conversations. I don't know if that was  
9 maybe not definitive, what it was in reference to. I'm sorry,  
10 93?

11 Q Yes. Now, this is an email from you to Zayra, Z-a-y-r-a,  
12 dated October 2nd, 2015. Who is Zayra?

13 A I'm sorry, what's the exhibit, please?

14 Q 93.

15 THE COURT: Exhibit 93?

16 MR. BENNETT: Yes, sir.

17 THE COURT: It's in the second book there, Mr.  
18 Martorello.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Zayra Emanuelli, talking about the first  
21 one?

22 MR. BENNETT: Yes, sir, but I was trying to avoid  
23 having to spell it which is E-m-a-n-u-e-l-l-i.

24 A Zayra, she was a CPA at Liont, LLC, in Puerto Rico, and  
25 she was assisting me with valuations for income tax purposes.

1 Q And Liont, LLC, is -- was the new name or new entity that  
2 succeeded Bellicose; correct?

3 A No. It was not affiliated with Bellicose or similar to  
4 Bellicose.

5 Q But Liont was your company, still your company today?

6 A Correct. It's a management company effectively.

7 Q And you run it, so she worked for you?

8 A She did, yes.

9 Q And she's an accountant that worked for you?

10 A She's a CPA, yes.

11 Q Here, you were explaining the state of affairs, and this  
12 was as of October 2015, the state of affairs related to the Red  
13 Rock business; correct?

14 A Incorrect. It was -- the email is October 2015. The  
15 state of affairs was in a fair market value buyer's view  
16 June 2015.

17 THE COURT: For what purposes?

18 THE WITNESS: For tax purposes.

19 THE COURT: Whose tax?

20 THE WITNESS: For my taxes.

21 THE COURT: I know, but who was imposing the tax?

22 THE WITNESS: It would be --

23 THE COURT: Federal income tax, sales, what kind of  
24 tax?

25 THE WITNESS: It was income tax -- capital gains tax

1 to the U.S. and Puerto Rico.

2 THE COURT: For your personal returns?

3 THE WITNESS: Yes. They would have -- yes.

4 Q Now, as I understood, yesterday you were trying to explain  
5 that whatever fear that motivated you as to government  
6 regulators shutting down the business, that that had abated  
7 before the negotiations, your fear had abated before the  
8 negotiations that led to the 2015 transaction.

9 A That's correct.

10 Q Okay. So in this Exhibit 93, this is October of 2015, and  
11 you've just said it's describing your view of the world as of  
12 June 2015; right?

13 A No. I said distinctly describing the fair market value or  
14 public perception view of the world, not my view. That's the  
15 difference between the tax perspective or, you know, a  
16 knowledgeable market participant in the industries. Unique  
17 knowledge.

18 THE COURT: I don't understand what you said.

19 THE WITNESS: So for the tax valuation studies, you  
20 have to use the perspective of a random sort of Joe Public fair  
21 market value buyer, not necessarily someone who is, you know,  
22 knowledgeable about, you know, the goings-on of the changes in  
23 the industry or, at a more intimate level, for example, with  
24 successful lobbying efforts with federal agencies or Congress.  
25 Like those sort things would be a unique -- it's not the same

1 as the fair market value buyer. Is that helpful?

2 THE COURT: I think I understand, but what you are  
3 saying is that this fair market value you are talking about,  
4 the buyer -- the person establishing that, whether it be an  
5 appraiser or a buyer, is unaware of the things in the  
6 particular industry that affect the market value; is that what  
7 you are saying?

8 THE WITNESS: Correct. For better or worse, that's  
9 correct.

10 THE COURT: And that's created because of what? Why  
11 is that so? Why is that a relevant framework; because of the  
12 law of somebody, because of a tax ruling, or what?

13 THE WITNESS: Yes. The tax -- the way the valuations  
14 have to be done for tax purposes have to be from the perspective  
15 of any general outsider. So mainly it's going on in the press  
16 or how do they see the regulatory impact or things going on,  
17 not necessarily a unique individual -- I wouldn't be a fair  
18 market value buyer because I have more specialized knowledge.  
19 So for valuation purposes --

20 THE COURT: Wait a minute. As I understand the  
21 regulations, the fair market value is determined by the  
22 generally available knowledge in the industry -- about the  
23 industry and the business.

24 THE WITNESS: That's correct.

25 THE COURT: So if, for example, there were lawsuits

1 pending against a business, that would be considered in  
2 assessing the fair market value.

3 THE WITNESS: Precisely, yes.

4 THE COURT: But the fair market value does not  
5 include the insider's knowledge of that particular business;  
6 right? Is that what you are saying?

7 THE WITNESS: Correct, either the business or the  
8 pending threats of changes in legislation or Choke Point,  
9 things like that.

10 THE COURT: But if the business -- if the public were  
11 aware of Choke Point, lawsuits, whatever, that affected the  
12 value of the business, then that's considered in the general  
13 assessment of the fair market value.

14 THE WITNESS: Yes.

15 THE COURT: Okay. But not your personal perception  
16 of it all.

17 THE WITNESS: Precisely, yes, sir. Yes, Your Honor.  
18 Thank you.

19 THE COURT: All right, I understand. Go ahead, Mr.  
20 Bennett. I apologize for interrupting.

21 Q So what you are saying is that the valuation that you  
22 would tell the tax authorities assume facts which you believed  
23 were false as they pertain to your company?

24 A Yes. They were not necessarily what I would have believed  
25 as we discussed, yes.

1 Q And so I've circled from Exhibit 93 some of the  
2 assumptions that you said you could use. I guess, what, if you  
3 were audited, this is what you'd say? It says, "We will  
4 provide all the support in the world for this so we can support  
5 fair market value. If nobody could argue with us about fair  
6 market value, then we did it right, and it doesn't matter what  
7 the future value is later on." That's what FV stands for, is  
8 future value?

9 A It could be fair value, or it could be future value. I'm  
10 not sure. I'd have to look at the whole email.

11 THE COURT: Where are you reading from?

12 MR. BENNETT: I'm sorry, Judge. I'm reading  
13 Exhibit 93 --

14 THE COURT: I know. Where?

15 MR. BENNETT: Bottom paragraph that has the numbered  
16 subparagraphs.

17 THE COURT: "Some thoughts to share."

18 MR. BENNETT: Yes, sir.

19 THE COURT: "Some thoughts to share on FMV versus  
20 FV." FMV is fair market value. What is FV again? I lost  
21 that.

22 THE WITNESS: I believe that would be fair value then  
23 as a comparative. For example, the tribe is a fair value  
24 buyer, not a fair market value buyer.

25 THE COURT: All right, go ahead.



1 Q So the explanation that you would tell the tax authorities  
2 would include, number one, that the tribe is buying your  
3 business because your contract gets terminated and the tribe  
4 wants it to continue. That's what you're saying; right?

5 A From a fair market value perspective, these would be, yes,  
6 the positions that I'm just sort of hypothesizing would be in  
7 play.

8 Q So the first point is that you were intending to terminate  
9 your contract with the tribe?

10 A No. It was that the contract naturally terminates at some  
11 date after however many -- I think it was a seven-year  
12 contract, and they wanted self-sufficiency and continuity. So  
13 that purchasing would provide them that.

14 THE COURT: Excuse me. Paragraph one, the tribe is  
15 buying it. What does that mean, "it"?

16 THE WITNESS: The Sourcepoint -- Bellicose and  
17 Sourcepoint.

18 THE COURT: So the tribe is buying Sourcepoint and  
19 Bellicose because our contract -- what's our?

20 THE WITNESS: That is the servicing agreement from  
21 2012.

22 THE COURT: And the parties to that were?

23 THE WITNESS: That was through Sourcepoint VI and Red  
24 Rock Tribal Lending.

25 THE COURT: Because that contract gets terminated and

1 they want this to continue. Who is "they"?

2 THE WITNESS: The tribe would like the business to  
3 continue.

4 THE COURT: "This" is the business?

5 THE WITNESS: They would like the services to  
6 continue.

7 THE COURT: All right. So under that sentence, you  
8 are saying, but if someone asks, you're going to tell them  
9 this: The tribe is buying Sourcepoint because the Sourcepoint  
10 contract gets terminated, and the tribe wants the servicing to  
11 continue. Is that what we're saying there with the indefinite  
12 pronouns as you've corrected them?

13 A I believe you are correct, Your Honor.

14 Q Now, the second reason supporting your lowered valuation  
15 would be number two, that Operation Choke Point is a risk for  
16 Sourcepoint owners but not for the tribe; correct?

17 A Yes, I can see that.

18 Q And that Operation Choke Point was one of the leading  
19 government crackdowns that was interfering with the operation  
20 of the tribal lending businesses; right?

21 A I disagree with the -- I would define it differently, I  
22 think.

23 THE COURT: What is Operation Choke Point?

24 THE WITNESS: So Operation Choke Point was a  
25 coordination between government agencies.

1 THE COURT: Which agencies?

2 THE WITNESS: It was the FDIC, the DOJ, and some  
3 state agencies like New York DFS.

4 THE COURT: Did it involve the Consumer Protection  
5 Bureau?

6 THE WITNESS: Some would argue they were involved,  
7 yes.

8 THE COURT: So it's federal agencies and state  
9 agencies. When you said agencies, you mean federal and state  
10 agencies.

11 THE WITNESS: Correct. It was a collaboration of  
12 efforts, team effort sort of, and it was not a sanctioned  
13 effort by any agency. It was sort of factions had bonded  
14 together to try and choke off bank accounts.

15 THE COURT: Well, Operation Choke Point had a name,  
16 did it? Did you give it the name, or did the government give  
17 it the name?

18 THE WITNESS: The government gave it the name.

19 THE COURT: All right. You say the tribe doesn't  
20 have any risk from federal regulation. Yesterday you told me  
21 the tribe did have risk from federal regulation. What's the  
22 difference?

23 THE WITNESS: Well, they are subject to the federal  
24 lending laws, but Operation Choke Point is not a federal  
25 regulation.

1 THE COURT: I know, but the tribe could be prosecuted  
2 by the federal government for violation of federal law no  
3 matter where it occurs; right?

4 THE WITNESS: That's correct, yes.

5 THE COURT: If there's a conclusion that federal law  
6 is violated by whatever is being done by the tribe, the tribe  
7 is amenable to the judicial process in the federal system to  
8 adjust that; right?

9 THE WITNESS: That's correct. They don't have  
10 immunity from that.

11 THE COURT: Okay. Excuse me, Mr. Bennett. Go ahead.

12 MR. BENNETT: Yes, sir.

13 THE COURT: All right, Mr. Bennett, what else?

14 Q So, Mr. Martorello, your declaration says that, and I'm  
15 looking at paragraph 67, that "neither I nor any company I own,  
16 manage, directed, or controlled the creation of Big Picture."  
17 And, in fact, yesterday, we saw that you created  
18 bigpictureloans.com, designed all the materials, suggested this  
19 adoption, and then participated in the transition from Castle  
20 Payday to Big Picture Loans; right?

21 A That's correct.

22 Q Now, what type of control did you have -- let me try it  
23 this way: With Red Rock, if the co-managers -- by the way,  
24 with respect to the co-managers --

25 THE COURT: Of what? Co-managers of what?

1 MR. BENNETT: Co-managers of Red Rock.

2 Q During the time that Red Rock had these co-managers,  
3 you're aware that they had full-time jobs unrelated to Red  
4 Rock; correct?

5 A That's incorrect in the total context.

6 Q For Red Rock. At what point did they not have a full-time  
7 job unrelated to Red Rock?

8 A Ms. Hazen, she did not have another full-time job when she  
9 became the full-time CEO of Red Rock, and I think that was  
10 probably sometime in 2014.

11 Q Okay. In late 2014.

12 A I don't know the exact date.

13 Q Okay. But nobody else had a -- I mean everybody else had  
14 a full-time job.

15 A Yes, I believe that's correct.

16 Q How many employees did Red Rock have, actual Red Rock  
17 Lending have in 2011?

18 A I don't know. In 2011 -- they didn't start lending until  
19 2012, so none.

20 Q Okay. Are you aware that your brother has testified in a  
21 declaration that Red Rock, even 2012, didn't have any  
22 employees?

23 A Well, it had the Duck Creek employees.

24 THE COURT: Excuse me, I think the question was are  
25 you aware that your brother testified that way.

1 THE WITNESS: I believe that's an inaccurate --

2 THE COURT: Wait a minute.

3 THE WITNESS: It's inaccurate.

4 THE COURT: There's an old movie star named John  
5 Wayne, and he said listen tight, and what he meant by that is  
6 listen to the question and just answer the question.

7 So the only question on the floor is are you aware  
8 your brother testified that way, not whether he was correct or  
9 not. That can be dealt with later. Are you aware he testified  
10 that way or not?

11 THE WITNESS: No, I don't think he testified that  
12 way --

13 THE COURT: No then.

14 Q Duck Creek was a separate corporate entity; correct?

15 A That's correct.

16 Q I'm asking you about Red Rock Lending. That's the company  
17 you had a servicing agreement with; right?

18 A One of them, yes.

19 Q So with Red Rock Lending, Red Rock had no employees in  
20 2012; right?

21 A I'm sorry, as a technical answer to that, I don't know how  
22 to answer it, because -- so Duck Creek had all the employees.  
23 It was a PEO, so it provided all the --

24 THE COURT: What's PEO?

25 THE WITNESS: Professional employment organization

1 similar to how ADP, for example, could be -- like I'm an  
2 employee technically of Insperity although I work for Balance  
3 Credit. So everyone was employees of Duck Creek although they  
4 worked for Red Rock full time. It's --

5 THE COURT: It's a big temp agency contract.

6 THE WITNESS: Similar to that, but it's, you know,  
7 internally owned. So the tribe put their employees in Duck  
8 Creek to work for Red Rock. So it's correct that there were no  
9 employees in Red Rock, but it's technically incorrect because  
10 they were employees of Duck Creek acting as employees of Red  
11 Rock. That's what I'm trying to say.

12 THE COURT: What, did they just throw them over  
13 there, or was there an agreement, you go over and work for Red  
14 Rock?

15 THE WITNESS: All the employee benefits and  
16 everything were in Red Rock, and there was an agreement -- I'm  
17 sorry, Duck Creek, and there was an agreement between Duck  
18 Creek to provide the services for Red Rock.

19 THE COURT: So Duck Creek is just providing services,  
20 not providing employees.

21 THE WITNESS: It's providing --

22 THE COURT: Providing people to do the services, not  
23 providing temporary employment through like a temporary  
24 employment agency.

25 THE WITNESS: I think that's pretty close. The

1 reason generally you do this is to isolate employee liability.  
2 So the employees will be in an entity, and then it will service  
3 the actual business. So that's how they structured it.

4 THE COURT: Who tells you that that kind of system  
5 works -- well, I'll get to that later. I understand, I think,  
6 what it is. Go right ahead.

7 Q So with Red Rock, could the tribe determine, without any  
8 approval of Sourcepoint, to -- what interest rate to charge  
9 consumers?

10 A Yes, they could.

11 Q And could Big Picture determine what interest rate to  
12 charge consumers?

13 A Yes.

14 Q And --

15 THE COURT: He said yes.

16 MR. BENNETT: Yes.

17 THE COURT: Let him answer the question. Did you  
18 answer yes? I thought you did.

19 THE WITNESS: Yes, they can.

20 THE COURT: Is that through today?

21 THE WITNESS: Yes.

22 Q And Eventide does not have any legal right to determine  
23 what interest rate Big Picture charges; right?

24 A That's correct.

25 Q Could Red Rock determine to settle any governmental action



1 with a governmental authority without Sourcepoint's approval?

2 A Yes.

3 Q And could Red Rock settle any lawsuit without  
4 Sourcepoint's approval?

5 A I believe they could.

6 Q With respect to Big Picture now, can Big Picture resolve  
7 any complaints or settle any matter with the governmental  
8 authority without Eventide's approval?

9 A They could.

10 Q Could Big Picture settle any civil action with consumers  
11 who have sued without Eventide having the right to approve  
12 that?

13 A They can do anything they want. They can do that.

14 Q And, legally, they're allowed to do that under their  
15 contract without being in violation of the contract.

16 A That's a little different. They can take actions that are  
17 in default of their agreements.

18 Q And so when I say that they can do something, when I say  
19 Red Rock can charge whatever interest rate, of course they can  
20 do anything. They could murder someone. I'm asking could they  
21 legally, without violating the contract, settle a lawsuit, Red  
22 Rock, without Sourcepoint's approval and your approval?

23 A You are asking about Big Picture?

24 Q I'm asking about Red Rock first.

25 A I don't really know the servicing agreement well enough to

1 say that would violate a provision. I don't recall any  
2 provision that that would violate off the top of my head.

3 Q What about setting an interest rate? Could Red Rock set  
4 any interest rate it wanted to set without violating any  
5 provision?

6 A I believe they could.

7 Q Then Red Rock became Big Picture Loans; right?

8 A In some respect, yes.

9 Q And Red Rock can charge consumers any interest rate  
10 that -- I'm sorry, Big Picture Loans is allowed to charge any  
11 interest rate that it believes appropriate without violating  
12 any prohibition that you and your companies could assert;  
13 right?

14 A I'm sorry. Can you rephrase that, please.

15 Q Do you believe that Red Rock -- I'm sorry, do you believe  
16 that Big Picture has the authority and discretion to control  
17 its own business?

18 A Yes.

19 Q And Eventide cannot interfere in that business because, as  
20 you've said in your declaration, it's merely a creditor; right?

21 A I'm sorry, you said it cannot interfere in the business.  
22 Is that what you said?

23 Q Why don't we look at your declaration. We can talk about  
24 86. "As far as I'm aware, Big Picture's co-managers make all  
25 decisions on behalf of that company"; right?

1 A Yes.

2 Q One of those decisions the co-managers could make is what  
3 interest rates to charge consumers; correct?

4 THE COURT: He's already said this about three times.

5 MR. BENNETT: But, Judge, then he said, he said, yes,  
6 they could charge whatever interest rate, but then he says I'm  
7 not conceding that they're allowed to charge any interest rate.

8 THE COURT: Mr. Bennett, the problem lies in that you  
9 didn't frame the question with particularity as to what  
10 particular entity. Your first line of questioning was whether  
11 they could decide what interest rate to charge without Mr.  
12 Martorello's permission or Sourcepoint's permission or  
13 violating any contract they had. You did the same thing with  
14 respect to settling with or without the permission of those  
15 folks or violating those contracts. Then you shifted to  
16 Eventide. If you want to ask him about Eventide, ask about  
17 Eventide, because you can't merge the two. They are different  
18 agreements.

19 MR. BENNETT: Yes, sir.

20 Q So is Big Picture -- I know we have the issue of the class  
21 settlement, but prior to the class settlement, if Big Picture  
22 had decided it only wanted to charge a 50 percent interest  
23 rate, did Big Picture have the authority, did its co-managers  
24 have the authority to do that?

25 A They can do that, yes.

1 Q And had the authority to do it under their contracts with  
2 Eventide as well.

3 A You use the word authority. They had the authority to do  
4 it, but I believe that would have been a default of their loan  
5 agreements.

6 Q And if Big Picture's co-managers decide to resolve a  
7 governmental action or a consumer class action, you believe  
8 they can't do that without Eventide's approval without  
9 violating Eventide's contract.

10 A I don't know as to the former, but as to the latter, I'm  
11 aware of the additional indebtedness provision, that it would  
12 violate the additional indebtedness.

13 THE COURT: Eventide can always -- Sourcepoint can  
14 always waive any default provision in any contract; right?

15 THE WITNESS: Absolutely.

16 THE COURT: The bottom line is that they couldn't do  
17 these things that he's asking about, charge interest rates,  
18 settle cases without the permission of Sourcepoint or  
19 Eventide -- is that right? -- in the form of a waiver of  
20 default.

21 THE WITNESS: Close. I'm saying that they can do  
22 them. It may result in a default, and that can be worked out  
23 through a waiver. They can freely do -- they can default if  
24 they can --

25 THE COURT: One thing is the doing of it. Of course

1 they can do it.

2 THE WITNESS: Yes.

3 THE COURT: They can do anything they want to do.

4 THE WITNESS: Exactly, yes.

5 THE COURT: The question is whether it has legal  
6 consequences, and to avoid legal consequences, they have to  
7 secure the approval of Eventide and Sourcepoint; is that right?

8 THE WITNESS: That's absolutely correct.

9 THE COURT: By way of the waiver.

10 THE WITNESS: That's absolutely correct for Eventide.  
11 I don't remember Sourcepoint's contract to articulate that.

12 MR. SCHEFF: Your Honor, I believe Mr. Bennett is at  
13 his time.

14 THE COURT: How much time, because I talked a lot.

15 MR. DILLON: Your Honor, I have Mr. Bennett having  
16 roughly four minutes and 30 seconds left.

17 MR. SCHEFF: Our folks call it differently, but four  
18 minutes and 30 seconds is fine.

19 MR. BENNETT: Judge, I would also --

20 THE COURT: You're on your clock because you started  
21 talking. Four minutes and 30 seconds. Go.

22 Q Mr. Martorello, turn to Exhibit 100, please. Now, after  
23 the sale by -- after the merger that created Big Picture,  
24 Ascension and Eventide's transaction, your former employees at  
25 Sourcepoint became the management individuals or became the

1 president and the controlling authority within Ascension;  
2 correct?

3 A I disagree.

4 Q At 100, the lender had authority. Eventide had authority  
5 over the firing and hiring of the president; correct?

6 A That's -- I don't agree with that interpretation.

7 Q All right. So you take a look at 100. Do you have it in  
8 front of you?

9 A I do.

10 Q And take a look at the top paragraph. This is an email  
11 from you to Karrie Wichtman dated January 14, 2016. Do you see  
12 that?

13 A Yes, sir.

14 Q It says, "The lenders care" -- and this would be the  
15 investing lenders -- right? -- including Eventide?

16 A Yes, institutional, private, and Eventide.

17 Q They care about the person who runs the business of AT,  
18 Ascension Technology; correct?

19 A That's correct.

20 Q And "If the transaction documents are clear that the  
21 position in question and under scrutiny to lenders is president  
22 and CEO" -- that's Brian McFadden; right?

23 A Yes, that's correct.

24 Q "Then I think we're okay." You wrote, "As far as I know,  
25 the managers don't really do anything"; is that correct?

1 That's what you wrote?

2 A That's what I wrote.

3 Q Okay.

4 MR. BENNETT: I don't have any other questions right  
5 now, Judge.

6 THE COURT: The word lenders, does that include any  
7 of the entities that you own or control an interest in?

8 THE WITNESS: Yes.

9 THE COURT: The term lenders.

10 THE WITNESS: That would include Eventide, yes.

11 THE COURT: Anybody else?

12 THE WITNESS: Yes. The hedge funds that were lending  
13 to the tribe, and there were maybe eight or nine --

14 THE COURT: I mean companies in which you had an  
15 interest.

16 THE WITNESS: Oh, no. There might have been an  
17 entity that was involved for working capital at the inception  
18 for a short period, but I can't articulate that off the top of  
19 my head.

20 THE COURT: All right, thank you.

21 MR. SCHEFF: Thank you, Your Honor.

22 MR. BENNETT: Your Honor, we also yesterday, in terms  
23 of a housekeeping matter, offered a new exhibit which is  
24 Exhibit 139. The court reporter and Your Honor's law clerk  
25 already have a copy as does, I believe, Ms. Brown, but this is

1 the Court's copy.

2 THE COURT: What are we doing about all these  
3 exhibits? I've got exhibits numbered one through what here in  
4 these two notebooks? What are they?

5 MR. BENNETT: Those are the exhibits we've gone  
6 through. We would move for their admission.

7 THE COURT: You didn't go through all of them.

8 MR. BENNETT: No, we didn't, Judge, but the exhibits  
9 themselves still are evidence. They're all documents produced  
10 by the defendant or parties against interest.

11 THE COURT: So you are saying that you all have  
12 agreed that these can be considered as exhibits; is that what  
13 you are saying?

14 MR. BENNETT: There are some objections to exhibits.  
15 We would move for their admission of the exhibits and can  
16 defend if there's any objection that counsel has to any  
17 particular exhibit. With respect to those that we formally  
18 examined the witness about, the defendants certainly could have  
19 said something as we were examining the witness. But we would  
20 move for their mission.

21 THE COURT: All of these including 139?

22 MR. BENNETT: Yes, sir.

23 THE COURT: Any objection?

24 MR. SCHEFF: I just have a question for Mr. Bennett.

25 THE COURT: All right, sure.



1 (Counsel conferring.)

2 MR. SCHEFF: Your Honor, as I recall from yesterday  
3 morning when you -- when we opened court, you said that you  
4 would be considering all of the materials that have been  
5 submitted with the briefs.

6 THE COURT: That had been submitted with the briefs.

7 MR. SCHEFF: That's correct. So to the extent that  
8 Mr. Bennett's exhibits match what's attached to his brief, we  
9 obviously have no objection. To the extent there are  
10 additional exhibits, we have no objection either. I believe,  
11 and I'll have to verify this with my team, that all of the  
12 materials that we have provided to the Court, which I'm not  
13 going to reference through Mr. Martorello's testimony, have  
14 been attached to our briefs as well.

15 THE COURT: All right. Then Exhibits 1 through what?  
16 What are the numbers? One through 139 are admitted; is that  
17 it, Mr. Bennett?

18 MR. BENNETT: Yes, Your Honor.

19 (Plaintiffs' Exhibits 1 through 139 admitted.)

20 THE COURT: Are you going to be using these  
21 documents, these two notebooks, or am I going to shift to some  
22 other notebook?

23 MR. SCHEFF: Your Honor, I may make reference to --  
24 with the exception of the declaration, which obviously Your  
25 Honor has, I may make reference to one document that's in the

1 binder, but other than that, no. I'm just going to ask Mr.  
2 Martorello a handful of questions. Your Honor is correct that  
3 the overwhelming vast majority of his testimony has come in  
4 through Mr. Bennett's testimony, or his questioning.

5  
6 CROSS-EXAMINATION

7 BY MR. SCHEFF:

8 Q Mr. Martorello, I believe in response to the Court's  
9 question and to Mr. Bennett's questions, you were describing  
10 the difference between the fair market value valuation and the  
11 fair value valuation; do you remember that testimony?

12 A I do.

13 Q What was the valuation that was used for tax purposes that  
14 you actually used to pay tax on?

15 A Of the note was 108 million.

16 Q And --

17 THE COURT: You mean the fair market value of the  
18 company or of what? I didn't hear what you said. The fair  
19 market value of what was 108 million?

20 THE WITNESS: The fair market value of Bellicose  
21 equity January 2016, date of the sale, was valued for tax  
22 purposes at 108 million.

23 Q And did you use --

24 THE COURT: That's the date of the sale to the tribe.

25 THE WITNESS: Yes, that's correct.

1 MR. BENNETT: I object as hearsay, Judge, and no  
2 foundation.

3 THE COURT: All right. Well, you need to lay  
4 foundation, but I rather much assume he knows that, but it  
5 hasn't been laid.

6 Q Mr. Martorello, did you hire tax advisors for purposes of  
7 establishing a valuation for tax purposes?

8 A I hired Aranca, yes.

9 Q Did you work closely with Aranca?

10 A Yes.

11 THE COURT: What are you saying?

12 MR. SCHEFF: Aranca is the name of the company, Your  
13 Honor, A-r-a-n-c-a.

14 THE COURT: Aranca.

15 Q And, Mr. Martorello, did you work closely with Aranca as  
16 they worked to establish a valuation for tax purposes?

17 A I did.

18 Q And did you have other tax consultants and lawyers who you  
19 used for that process as well?

20 A I believe I used -- maybe BDO. I can't recall.

21 Q BDO meaning BDO Seidman?

22 A BDO, yes.

23 THE COURT: I understood him to say that the stated  
24 FMV for the purposes of the sale was 108. He wasn't opining  
25 personally that it was; is that correct?

1 MR. SCHEFF: Yes, that's right, Your Honor.

2 THE COURT: What objection is there to that, Mr.  
3 Bennett, that he's saying that's what the stated purpose was --  
4 I mean the stated value in the sale document at the time of  
5 sale as opposed to his opinion that that was actually the fair  
6 market value?

7 MR. BENNETT: We don't have any objection to the  
8 testimony that Mr. Martorello put down, wrote that it was 108,  
9 but the testimony heard to me seemed to suggest that that was a  
10 value.

11 THE COURT: Mr. Scheff has made clear he was just  
12 asking him what was the stated value in the transaction, not  
13 what Mr. Martorello's opinion was as to the value, and I am not  
14 accepting the testimony as anything other than the stated value  
15 in the sale transaction of Bellicose in January of -- what was  
16 it?

17 THE WITNESS: 2016.

18 THE COURT: 2016 was \$108 million per and that he  
19 used Aranca in arriving at that figure.

20 MR. BENNETT: Your Honor, as to that second, I would  
21 object to that as hearsay and purported expert testimony, that  
22 is having -- what the witness would say --

23 THE COURT: It's relevant for the purpose that he  
24 relied on it, not for the purpose of whether it's true or not.

25 MR. BENNETT: Yes, sir.

1 THE COURT: It's not a hearsay objection.

2 MR. BENNETT: Yes, sir.

3 THE COURT: It's only relevant for the fact that he  
4 relied upon what they said, not whether what they said from an  
5 expert's testimony is correct.

6 MR. BENNETT: Yes, sir.

7 THE COURT: All right, Mr. Scheff.

8 MR. SCHEFF: Thank you, Your Honor.

9 Q In your testimony, Mr. Martorello, you referred to  
10 Operation Choke Point; correct? Do you remember that?

11 A Yes.

12 Q And are you -- in the summer of 2014, what was your  
13 understanding about what the status of Operation Choke Point  
14 was?

15 A It was expressly acknowledged by Congress and congressmen  
16 and the agencies themselves as inappropriate abuse of  
17 investigatory threats to choke off banking, and it was  
18 admonished and ceased.

19 MR. BENNETT: Object. Again, objection, Judge. It's  
20 hearsay. It's also opinion testimony by a lay witness, that is  
21 to the extent that Mr. Martorello's testifying that Congress  
22 and everyone else had decided that this governmental action was  
23 inappropriate.

24 MR. SCHEFF: Your Honor, it's relevant to state of  
25 mind. Mr. Bennett has been saying that Mr. Martorello's

1 declaration with respect to his motivation for sale was driven  
2 by regulatory risk and potential litigation risk. He  
3 testified, Your Honor --

4 THE COURT: It's not admissible to prove that  
5 Congress or anybody else did what he said they did. It is  
6 admissible so long as he says it was his understanding that  
7 Congress had done that and that it had been suspended, because  
8 it informs his state of mind.

9 In other words, if the threat has been dissipated by  
10 dissolution, then it's not any longer a threat to be considered  
11 in making a business decision as I understand your point. Is  
12 that correct?

13 MR. SCHEFF: Yes, Your Honor.

14 THE COURT: Objection is sustained to the extent that  
15 if that testimony was proffered as true of what Congress  
16 actually did or the agencies did, that's inadmissible for that  
17 purpose. It is admissible for the limited purpose of Mr.  
18 Martorello's understanding and his state of mind respecting the  
19 threat of litigation and government regulatory action.

20 MR. SCHEFF: Thank you, Your Honor.

21 Q What's the basis of your understanding, Mr. Martorello?

22 A August 2013 letter from Congress to the FDIC and the DOJ  
23 followed by the FDIC removing the word payday off what was --  
24 what they title as a hit list for banks to not provide services  
25 to anyone with the word payday, and then in June 2014 Congress

1 issued --

2 MR. BENNETT: Objection. Judge, now this is beyond  
3 this.

4 MR. SCHEFF: It's not, Your Honor.

5 THE COURT: Wait a minute.

6 MR. BENNETT: It's hearsay, and it's lay opinion. To  
7 the extent that the witness says I believe that this was no  
8 longer the case, that's one thing. To the extent the witness  
9 is now saying there's this document, this document, and this  
10 document, which, by the way, aren't even proffered here or in  
11 this case and we think are untrue, but they're not proffered  
12 and is contradicted by his own emails where he said Operation  
13 Choke Point in 2015 was an issue.

14 THE COURT: That's all right. You can deal with  
15 that. He can say he relied on documents. The documents aren't  
16 in the record. I'll give that whatever weight I can give it  
17 which is nothing. I don't have any documents that have been  
18 offered into evidence about Congress or anybody else, but he  
19 can say I read these things, and I formed the belief that  
20 such-and-such, and it's admissible for that limited purpose.

21 So you can ask him what documents he relied on. One  
22 of them was an August 2013 letter, one was a June 2013  
23 something. I don't know what it was because the objection  
24 interceded.

25 MR. SCHEFF: I think it was 2014, but Mr. Martorello

1 --

2 THE COURT: What is it?

3 THE WITNESS: It was a report from the -- one of the  
4 Congressional -- it was from Congress. I'm sorry I can't  
5 articulate exactly who it was in Congress, but they had done a  
6 multi-week study of Operation Choke Point and issued a --

7 THE COURT: When was this?

8 THE WITNESS: This was June 2014.

9 THE COURT: What?

10 THE WITNESS: It was June 2014, and it was, I think,  
11 the House oversight committee.

12 THE COURT: You read these things?

13 THE WITNESS: Yes. And it issued their study after  
14 multi weeks of study what Operation Choke Point was and how  
15 inappropriate it was.

16 THE COURT: You read it, you interpreted it to mean  
17 those things.

18 THE WITNESS: That's correct.

19 THE COURT: Whether it said that or not, I don't  
20 know. All right, go ahead. And I don't know that it's  
21 relevant. Go ahead.

22 Q Mr. Martorello, in your declaration -- strike that. Mr.  
23 Martorello, you've been asked several times yesterday and this  
24 morning about your declaration insofar as it speaks to your  
25 lack of involvement in the formation of either Red Rock or Big



1 Picture. Do you remember those questions and your testimony?

2 A Yes.

3 Q In your declaration, what did you mean by the words  
4 formation or creation?

5 THE COURT: Can you point me to a paragraph?

6 MR. SCHEFF: I can, Your Honor. I believe paragraph  
7 17. And if you'll give me just a moment. I believe the other  
8 paragraph is 102.

9 THE COURT: 102 is creation or both or what?

10 MR. SCHEFF: It is form, the word form, and 17 is  
11 creation.

12 THE COURT: All right, you are asking about 17 first,  
13 what does he mean by creation.

14 MR. SCHEFF: Yes.

15 Q What did you mean by the word creation in paragraph 17?

16 A I meant -- I was responding specifically to the statement  
17 in the complaint which was that I had helped Dan Gravel and I  
18 had helped form Red Rock or Big Picture, and we didn't help  
19 form it.

20 Tribal council is the only one who can form it. So it was  
21 the formation of the LLC. It was not advice as to, you know,  
22 business advice. It was the formation of the entity pursuant  
23 to the method of creation factor which we were providing this  
24 for, for the *Breakthrough* factors.

25 Q In paragraph 102 --

1 THE COURT: When you say you weren't involved in the  
2 formation of the LLC or the creation of the LLC, you, do you  
3 mean your lawyers were not involved and with your lawyers --  
4 and that you didn't communicate with your lawyers on that  
5 topic?

6 THE WITNESS: No, that's not what I mean.

7 THE COURT: In fact, you and your lawyers both  
8 communicated on that topic with the tribe, did you not?

9 THE WITNESS: That's correct.

10 THE COURT: And that had to do with exactly how this  
11 thing was to be formed and why; right?

12 THE WITNESS: Correct.

13 THE COURT: And it was in detail; right? Your people  
14 were thorough when they did that; right?

15 THE WITNESS: I believe so.

16 THE COURT: All right. So there's no question from  
17 the record that I'm aware of that his lawyers and he had  
18 intimate discussions with the lawyers for the tribe about how  
19 the documents were to be structured, what they were to provide,  
20 etcetera, etcetera. There was extensive back and forth on it.

21 MR. SCHEFF: Your Honor, the issue is what Mr.  
22 Martorello meant --

23 THE COURT: I know, but I want to make clear so you  
24 understand what I understand the record to be as of today.

25 MR. SCHEFF: I understand. I don't disagree with

1 that. The question is what Mr. Martorello meant in his  
2 declaration when he said formation and creation.

3 Q In paragraph 102, Mr. Martorello, when you are --

4 THE COURT: 102 are you saying?

5 MR. SCHEFF: Yes, Your Honor.

6 Q When you are quoting paragraph 29 of the complaint, what  
7 did you mean when you said, "Neither I nor Bellicose helped  
8 form Big Picture or Red Rock"?

9 A I meant that tribal council is the only one that can form  
10 the entity. They are the only ones that can do that. I wasn't  
11 involved or in the room or part of that process.

12 THE COURT: Excuse me. You've been citing paragraph  
13 101 related to the formation, and it actually is paragraph 102  
14 because he's quoting -- he's quoting the complaint and then  
15 uses the word "form" there. I don't see formation dealt with  
16 in 101. I think that's operation and control.

17 MR. SCHEFF: Your Honor, if I said 101, I misspoke.  
18 I was actually looking at 102 when I was asking the question.

19 THE COURT: That's what he meant, that's what I  
20 understood, because he was actually referring to that document.

21 MR. SCHEFF: Thank you, Your Honor.

22 Q Can you look at paragraph 69 of your declaration, Mr.  
23 Martorello.

24 A Yes.

25 Q What motivated -- at the point in time that you agreed to

1 sell Bellicose and Sourcepoint, what were the motivations for  
2 that sale?

3 A It was the attractive offer that I received from the  
4 tribe's council and the tribe.

5 Q And what do you mean by attractive offer?

6 A They presented to me a summary of what a term sheet or  
7 terms might look like, and they said it would be on a multiple  
8 of revenue. I asked what the multiple of revenue might be in  
9 terms of comparable transactions. They gave me a multiple that  
10 was very attractive, and now, for the first time, because the  
11 offers had economically been pretty low because I think they  
12 thought I was a motivated seller from the Choke Point stuff,  
13 this one was a real offer, and I was motivated by the price.

14 Q And why did the transaction close in January of '16 as  
15 opposed to some earlier time?

16 A I had studied the -- if it would work from a tax  
17 perspective for me. At one point I found out that it wouldn't,  
18 and I wasn't going to refuse to sell. That was October 2014,  
19 and then eventually I concluded that the sale would have to  
20 close January 1st, 2016, because then that would allow me and  
21 my family to move back to the mainland to raise our first kid.

22 Q And why was that a factor in your decision to sell at the  
23 time you sold?

24 A Because if we sold in 2015, I would have had to have  
25 stayed on the island until 2020, but in 2016, we could move

1 back, and we were having -- our child was born, you know,  
2 August 2015, so we were around first trimester, January,  
3 February 2015. So by that time, I knew that it was less likely  
4 my wife would want to be away from family.

5 Q Where is your wife's family?

6 THE COURT: Wait a second. Move back to the mainland  
7 from where?

8 THE WITNESS: From Puerto Rico.

9 Q Where is your wife's family?

10 A Southern Illinois.

11 Q Would you look at the --

12 THE COURT: So you moved back to where?

13 THE WITNESS: We moved to Chicago and eventually to  
14 Dallas.

15 THE COURT: To Dallas?

16 THE DEFENDANT: Dallas, Texas.

17 THE COURT: You needed to get away from her family  
18 then.

19 THE WITNESS: We wish they were around more.

20 THE COURT: You don't have to answer that.

21 Q Mr. Martorello, I want you to take a look at the last  
22 sentence of paragraph 69. Read that to yourself.

23 A "Plaintiffs claim were certain 'motivating factors' for  
24 the sale which, in reality, occurred 18 months to three years  
25 before the sale transaction closed."

1 Q What were those motivating factors which occurred 18 months  
2 -- strike that. What occurred 18 months to three years before  
3 the sale closed?

4 A That was Operation Choke Point, the Otoe-Missouria  
5 litigation, and the New York DFS actions to choke off the banks  
6 with the cease and desist.

7 Q And at this point in time that you made the sale, were  
8 they the motivating factors in the sale?

9 A No.

10 MR. SCHEFF: Your Honor, may I have a moment, please?

11 THE COURT: Yes, sir.

12 MR. SCHEFF: I have no further questions of Mr.  
13 Martorello, Your Honor.

14 THE COURT: Any cross-examination?

15 MR. BENNETT: No, Your Honor.

16 THE COURT: All right. Mr. Martorello, you may step  
17 down, and you are free -- he can leave if he wants so. Nobody  
18 is going to call him back. If he wants to leave, he can leave.  
19 He's a party. He can stay if he wants to.

20 THE WITNESS: Thank you, Your Honor. Appreciate the  
21 time.

22 MR. SCHEFF: Your Honor, we're going to move into  
23 playing our depositions, and I'll find out from my colleagues  
24 who we're going to play first. What we have for the Court is  
25 there'll be video. We do have the excerpted transcript for

1 Your Honor to follow along if you'd like with the exhibits  
2 attached that are referenced in the deposition. I believe  
3 we've also provided the Court -- because those exhibits are  
4 numbered differently, but we've corresponded them to the record  
5 so Your Honor ultimately can match those up.

6 THE COURT: All right. Do you have those?

7 MR. SCHEFF: I think so.

8 THE COURT: For me and my law clerk. Mr. Bennett,  
9 somebody over there stood up. Was it Ms. Kelly? I just saw  
10 some action. Did somebody stand up?

11 MR. BENNETT: Yes, Your Honor. It was not something  
12 controversial. I wanted to make sure that the exhibit book  
13 has -- I'm seeing mine as missing a page of a particular  
14 exhibit.

15 THE COURT: Fix it at the break. Coordinate with Mr.  
16 Scheff, make sure it's okay and just fix it.

17 MR. BENNETT: Yes, sir.

18 THE COURT: You have one for the law clerk? Now,  
19 she's not going to be required to transcribe what's being  
20 played because what's in this book is what we're doing; right?

21 MR. SCHEFF: Yes, Your Honor.

22 THE COURT: Are we going to mark that book designated  
23 testimony of Warren Scott Merritt as an exhibit?

24 MR. SCHEFF: We'll mark it as our next sequential  
25 exhibit, and I'll get that number from my colleagues, and we'll

1 continue to do that for the rest of your presentation.

2 THE COURT: How long does this go? Just  
3 approximately.

4 MR. SCHEFF: Eight minutes and 20 seconds.

5 THE COURT: We'll take our break sometime after this  
6 before we start.

7 MR. SCHEFF: Your Honor, while that's playing may I  
8 sit at counsel table?

9 THE COURT: Sure.

10 MR. SCHEFF: Thank you.

11 THE COURT: Unless you're of a mind to stand up to  
12 exercise yourself. You want to go back somewhere else? You  
13 can sit anywhere you want to.

14 All right, this is the deposition of Merritt,  
15 March 21, 2019.

16 (Video deposition of Warren Scott Merritt played.)

17 THE COURT: Is that it?

18 MR. SCHEFF: Yes, Your Honor.

19 THE COURT: How long is the next one?

20 MR. SCHEFF: It's about an hour, Your Honor.

21 THE COURT: We'll take a break of 20 minutes at this  
22 time. I'd like to tell you something. In listening to this  
23 testimony and reading these exhibits in preparation for and  
24 during the proceedings, I have very great difficulty  
25 understanding who is who, and I need a chart that tells me from



1 the time the borrower pays until Mr. Martorello receives, if he  
2 receives anything, what's the chain that money goes through,  
3 because I don't understand -- it's so convoluted with offshore  
4 trusts and whatever, but ultimately it appears to me from what  
5 I've been able to read that Mr. Martorello receives the money,  
6 and so do other people, investors and other people.

7 I have no idea what that is. I just need to see that  
8 so I know who the players are. My suggestion is that the --  
9 you all agree on a chart or the plaintiffs submit a chart based  
10 on what they know and you object to it and correct it if you  
11 want to do it. I don't care how you do it, but I don't think  
12 given your collective knowledge, I would think it wouldn't take  
13 you long to get that together. Is there any reason you can't  
14 do that?

15 MR. SCHEFF: No, Your Honor. My suggestion is that  
16 the parties work together to try and prepare a chart that we  
17 can submit jointly to the Court.

18 THE COURT: Are you agreeable to that, Mr. Bennett?

19 MS. KELLY: Yes, Judge. We would agree to do that.

20 THE COURT: Get me something by the first of the  
21 week, Monday.

22 MR. SCHEFF: Yes, Your Honor.

23 THE COURT: Thank you. And then the next part of it  
24 is, I want to know the percentage of the monies that go this  
25 way so I understand where the money that goes to the tribe goes

1 and where the money that goes to any of these entities. If it  
2 drops off along the way to some corporation and then that's  
3 spun off to somebody else, I need to know, but it's so  
4 complicated from the documents that I really had some  
5 difficulty, and I think you all know all that, and you assume  
6 in your questions that I know it, Mr. Martorello assumed in the  
7 answers that I knew some of it, and I thought I had a pretty  
8 good handle on it until I was really wrapping myself in the  
9 papers to get ready for this, and I concluded that my knowledge  
10 was inadequate to the task. So if I could get those two things  
11 by Monday, I would appreciate it.

12 MR. SCHEFF: Yes, Your Honor.

13 THE COURT: If you can't agree on them, then Monday  
14 you submit yours, Mr. Bennett, or Ms. Kelly, and then on  
15 Tuesday, you submit your corrections.

16 MR. SCHEFF: Yes, Your Honor.

17 MS. KELLY: Judge, can I ask for clarification? Do  
18 you want through the different time periods through today,  
19 because we don't have all the discovery of like what's been  
20 going on, so we may not have all of the information, but is it  
21 from inception to the present?

22 THE COURT: From Red Rock on.

23 MS. KELLY: Would you like amounts as well?

24 THE COURT: Separately. No, I don't -- just in a  
25 gross way what was the take for each. You all continue to work

1 that out. We'll take a recess of 20 minutes and then be ready  
2 to go.

3 (Recess taken.)

4 THE COURT: All right, the next thing is the  
5 deposition of Ms. Wichtman?

6 MR. SCHEFF: Yes, Your Honor. That will be, and that  
7 transcript you should have, should be marked 327.

8 THE COURT: Hers is --

9 MR. SCHEFF: Yes, sir.

10 THE COURT: And the other one is 326?

11 MR. SCHEFF: Yes, Your Honor.

12 THE COURT: DX-326 and DX-327. All right.

13 MR. SCHEFF: Thank you, Your Honor.

14 (Video deposition of Karrie Wichtman played.)

15 THE COURT: Excuse me just a minute. Hold on.  
16 There's something up on the screen. What's that? Is that the  
17 way you want this depicted, or is there something wrong with  
18 the machinery?

19 MR. SCHEFF: Your Honor, this is the exhibit she was  
20 looking at at the time.

21 THE COURT: Did they say what it was? The exhibit  
22 attached here is Exhibit 2 which is a statement of position  
23 regarding material misrepresentations, and Exhibit 6, Defense  
24 Exhibit 325, which is a memo.

25 MR. SCHEFF: Your Honor, I apologize. That's not

1 attached to the transcript. We had intended to do that.

2 That's an oversight. I apologize.

3 THE COURT: All right. I'll hear what she has to  
4 say. You're going to give me the exhibit? Do we have it?

5 MR. SCHEFF: Your Honor, if we can have a moment,  
6 we'll get you the exhibit.

7 THE COURT: Go ahead with it. Find it and hand it  
8 up.

9 (Video deposition of Karrie Wichtman played.)

10 THE COURT: Stop that a minute. She, at the  
11 beginning of this discussion, mentioned the timeframe, and I  
12 didn't catch it, but I thought -- because her voice dropped,  
13 and I thought -- I wrote down 2013 to '16. Can you tell me if  
14 that's correct or not from your knowledge, or can we go back?

15 MR. SCHEFF: In terms of her testimony, I thought --

16 MR. BENNETT: Judge --

17 THE COURT: What page was that?

18 MR. BENNETT: This is at page 55, line 17, "Question:  
19 And over what period of time" --

20 THE COURT: Wait a minute. Let me find it. Okay,  
21 hold on. I need to get it. I don't have that page. I don't  
22 have page 55.

23 MR. BENNETT: It would be numbered Section 8.

24 THE COURT: 55, line 14; is that right?

25 MR. BENNETT: Yes, sir.

1 THE COURT: "Probably centralized in 2013,  
2 maybe 2015, '16." Is that the timeframe we're talking about  
3 here?

4 MR. SCHEFF: Yes, that was her testimony, Your Honor.

5 THE COURT: You may resume. I just lost it, and I  
6 need to understand it. Go ahead and play.

7 (Video resumed.)

8 THE COURT: Do we have a lot of this asking her to  
9 vouch for what somebody else is saying? That testimony is not  
10 admissible. You all know that.

11 MR. SCHEFF: Your Honor, she has personal knowledge,  
12 as she testified, that she observed the co-managers, so she is  
13 in a position to determine whether someone's statement --

14 THE COURT: You cannot have one witness testify that  
15 another witness is telling the truth. That's a credibility  
16 judgment for the Court or the jury. It's not allowed. I don't  
17 know where on earth you got the notion that it is just because  
18 she has some personal knowledge about the circumstances -- are  
19 you asking her a whole bunch of questions like that?

20 MR. SCHEFF: Your Honor, there are a series of  
21 questions like that, yes.

22 THE COURT: Can you get rid of them? Is it easier to  
23 listen to them all?

24 MR. SCHEFF: Probably easier to listen.

25 THE COURT: I'm going to listen to them all but not

1 pay attention to them because that's not something I can  
2 consider.

3 (Video resumed.)

4 THE COURT: What paragraph are we on? I'm having  
5 trouble.

6 MR. SCHEFF: As she was observing it, it appeared one  
7 page ahead, so it's your page seven, last sentence of the last  
8 full paragraph. That's what she's referring to.

9 THE COURT: "Thus, shortly after"?

10 MR. SCHEFF: No. On page seven of the exhibit,  
11 starting, I believe, with the words "the tribal defendants."

12 THE COURT: What paragraph -- what's the first words  
13 in the paragraph?

14 MR. SCHEFF: The first word in the paragraph is  
15 "Rosette."

16 THE COURT: Okay. And then where, down there?

17 MR. SCHEFF: If you look at the last sentence in the  
18 paragraph, so it's the third line from the end of that --

19 THE COURT: "The tribal defendants used"?

20 MR. SCHEFF: Yes, Your Honor, I believe that's what  
21 she's about to testify about.

22 THE COURT: All right.

23 (Video resumed.)

24 THE COURT: Where are we talking about?

25 MR. SCHEFF: That is on page 12 of the exhibit --

1 THE COURT: 12, okay.

2 MR. SCHEFF: First sentence under D.

3 THE COURT: I just couldn't hear the page number. So  
4 that's the heading D, Rosette and Richardson.

5 MR. SCHEFF: Yes, sir, that's correct.

6 THE COURT: Go ahead.

7 (Video resumed.)

8 THE COURT: Where are we in the deposition? I'm  
9 having trouble following here. What page?

10 Okay, I've got it. Thank you. Thank you. You can  
11 play.

12 (Video resumed.)

13 THE COURT: All right, that's the end of that  
14 deposition?

15 MR. SCHEFF: Your Honor, we could do another before  
16 the lunch break.

17 THE COURT: How long do you have?

18 MR. SCHEFF: We're going to do James Dowd. It's  
19 18 minutes. Is that all right?

20 THE COURT: That will put us a little bit into the  
21 lunch hour -- have you all ordered your lunch?

22 MR. SCHEFF: Yes, Your Honor.

23 THE COURT: I signed some kind of document that said  
24 you could bring it into the building. Do we need to take an  
25 hour for lunch?

1 MR. SCHEFF: I don't believe so, Your Honor.

2 THE COURT: So who -- who do you have after the  
3 18-minute Dowd one? What do you have?

4 MR. SCHEFF: Well, we have a variety, but the next  
5 one that we were intending to play was --

6 THE COURT: How much time total?

7 MR. SCHEFF: How much time total?

8 THE COURT: Mr. Bennett said he wanted to play  
9 something.

10 MR. SCHEFF: 25 minutes I think he said.

11 THE COURT: A total of 25 minutes? Do you want to do  
12 your response to the Wichtman deposition now, or do you want to  
13 do it later?

14 MR. BENNETT: We discussed, because ours are not that  
15 long individually, that we would just put them together at the  
16 end of all this.

17 THE COURT: Okay. All right. So how long? Total.

18 MR. SCHEFF: Your Honor, the total number that we  
19 have remaining is 159 minutes. We're going to talk over the  
20 lunch break to see if we can pare that down, but that would  
21 bring us in under the four hours.

22 THE COURT: I'm just trying to figure out when's the  
23 best time. Maybe it's better to give you time to pare some of  
24 it down at lunch. Would you rather do that?

25 MR. SCHEFF: That's fine, Your Honor. We're happy to



1 do that.

2 THE COURT: Is there any reason you all can't do  
3 yours and get ready, Mr. Bennett? Sounds to me like it will  
4 help to take the lunch hour now as opposed to waiting.

5 MR. SCHEFF: Right. I believe Your Honor's shortened  
6 lunch hour would be fine if that's okay with everybody else.

7 MR. BENNETT: Logistically, Judge, we just now would  
8 be ordering our lunch, and we would need to ask the Court for  
9 the permission slip to save us the trouble of going out of  
10 security and coming back --

11 THE COURT: You can have it, but it has to be signed.

12 MR. BENNETT: Yes, sir. What I might suggest is --

13 THE COURT: Ms. Tashima, will you do a thing like I  
14 did for the others, and I'll sign it and send it down there.

15 MR. BENNETT: There are a handful of really small  
16 depositions that the defendant has designated, like five  
17 minutes, two minutes. So I don't want to interfere with the  
18 Court's schedule, but in terms of by the time we get our lunch  
19 here -- and I'm certainly not hurting for it --

20 THE COURT: How are you going to get your lunch? Why  
21 am I dealing with that?

22 MR. BENNETT: I said if we could put 15 more minutes  
23 of time into this hearing by playing --

24 THE COURT: That's fine by me. Play Dowd. That's  
25 18 minutes. I need to have something down to the CSOs, I

1 guess.

2 MR. SCHEFF: Your Honor, this will be 328.

3 (Discussion off the record.)

4 THE COURT: All right, go ahead, please.

5 (Video deposition of James Dowd played.)

6 THE COURT: All right. We'll take 30 minutes for  
7 lunch at this time.

8 (Luncheon recess.)

9 THE COURT: All right. We have more depositions?

10 MR. SCHEFF: Your Honor, with the -- I think the  
11 Court has already permitted this, but Mr. Martorello is going,  
12 with leave of Court, is going to go to the airport to catch his  
13 flight back to Texas.

14 THE COURT: Sure. He was excused from when he  
15 testified.

16 MR. MARTORELLO: Thank you, Your Honor.

17 THE COURT: Thank you, Mr. Martorello.

18 MR. BENNETT: Your Honor, in terms of housekeeping, I  
19 just had a conversation with Mr. Scheff. There is quite a lot  
20 of paper flying, information. Mr. Scheff does not contemplate  
21 us making any argument at the end of the evidence today which  
22 we would be okay with if that's the Court's preference. We've  
23 asked, and I understand Mr. Scheff has agreed, that when we do  
24 our other filings that the Court has asked for, a chart or the  
25 money, that we supplement and provide maybe a short, not an

1 argument brief but a short brief that would summarize the  
2 evidence as to the categories of misrepresentation we've  
3 alleged so that we don't have argument.

4 THE COURT: Tied to the transcript?

5 MR. BENNETT: Tied to the transcript.

6 THE COURT: Have you arranged for the transcript and  
7 determined when it can be delivered to you?

8 MR. BENNETT: Our court reporter, as I understand,  
9 probably had today's transcript done last week given the  
10 timing, but we certainly will order it as expeditiously as  
11 possible.

12 THE COURT: Well, she probably needs to work all  
13 night, I guess, to get it done on the schedule that we're  
14 talking about. You've arranged with her to get it done?

15 MR. BENNETT: I've not arranged it, but I'm a safe  
16 distance from her so staplers --

17 THE COURT: I don't know that that's correct. All  
18 right, we'll see. Let's proceed with what we're doing, and  
19 I'll reflect upon it.

20 MR. SCHEFF: Your Honor, the next witness we're going  
21 to call by deposition is Adil, A-d-i-l, Karam, K-a-r-a-m. This  
22 transcript that we handed up to the Court will be marked as  
23 329.

24 THE COURT: All right. You are giving these to the  
25 clerk for the record?

1 MR. SCHEFF: Yes, Your Honor.

2 (Video deposition of Adil Karam played.)

3 MR. SCHEFF: Your Honor, this relates to the  
4 testimony of Jennifer Weddle, and it will be Exhibit 330.

5 (Video deposition of Jennifer Weddle played.)

6 MR. SCHEFF: Your Honor, we're going to move on to  
7 the testimony of Rob Rosette, and that transcript that we just  
8 handed up will be marked as Defense Exhibit 331.

9 (Video deposition of Robert Rosette played.)

10 THE COURT: Just so you all know, that answer is  
11 exemplary of Mr. Rosette's utter disregard for answering the  
12 question and for serving as a lobbyist on behalf of the tribe,  
13 and that's exactly how I'm going to view all his testimony. He  
14 didn't answer the question. He just spewed out something he  
15 thought was okay, and wherever that appears in this testimony,  
16 that's how I'm going to regard it, because he's just being a  
17 lawyer there. He's not being a witness at all.

18 He didn't answer the question, and the question  
19 before that he didn't do and many others like that. Just so  
20 you know, don't cite him to me in any subsequent papers for  
21 anything, because it's his -- at best, his opinion, and he's  
22 not qualified to give it, and it's not relevant. It wasn't  
23 responsive to the question, and I'm kind of worn thin with a  
24 lot of this stuff. Ms. Weddle was the same way, and Ms.  
25 Wichtman was worse.

1           So, anyway, maybe I should have reviewed all these  
2 things ahead of time and stricken them, but I'm not paying  
3 attention to them. So in structuring your argument, you stay  
4 to the facts instead of the nonsense that these people have  
5 spewed by way of nonresponsive answers.

6           I'll let you figure out what fits that bill, and I'll  
7 consider it as it comes in for what it's worth, but you'll do  
8 well by yourselves and your clients if you will confine  
9 yourselves to what the facts are, not to these side comments  
10 that are not responsive. Next question begins with "And did  
11 Mr. Martorello," I believe.

12           (Video resumed.)

13           MR. SCHEFF: Your Honor, this is Michelle Hazen, and  
14 that will be Exhibit 332.

15           (Video deposition of Michelle Hazen played.)

16           THE COURT: Stop just a minute. What was that first  
17 stuff? It was a bunch of language I didn't understand. Was  
18 that just her name in the language of the tribe?

19           MR. SCHEFF: That's my understanding, Your Honor.

20           THE COURT: Oh, okay. So when she said all that long  
21 name and then said Michelle Hazen, she was answering what was  
22 my name.

23           MR. SCHEFF: Yes, Your Honor, that's my  
24 understanding.

25           THE COURT: Seeing it in writing is much better. You

1 can understand what it was. Sorry. All right, go right ahead.

2 (Video resumed.)

3 MR. SCHEFF: Your Honor, the next witness will be  
4 Craig Mansfield, Exhibit 333.

5 (Video deposition of Craig Mansfield played.)

6 MR. SCHEFF: Your Honor, next one is Joette Pete, and  
7 that's Exhibit 334.

8 (Video deposition of Joette Pete played.)

9 MR. SCHEFF: Your Honor, this is Dan Gravel, and this  
10 will be Exhibit 335, I believe.

11 (Video deposition of Daniel Gravel played.)

12 THE COURT: You don't really expect me to pay  
13 attention to that kind of stuff. How can you ask a question  
14 about somebody else's -- what's his state of mind opinion  
15 without -- why am I listening to stuff like this?

16 MR. BENNETT: Your Honor, this was our team that was  
17 questioning. We were asking --

18 THE COURT: Why would you question it?

19 MR. BENNETT: We expected him, as a lawyer, to say I  
20 can't tell you about state of mind. We didn't expect --

21 THE COURT: That's why you asked the question, to get  
22 an answer you couldn't -- put that one back in the box. They  
23 used it because it helps them, but it's something I'm not going  
24 to consider because it's not something that's admissible under  
25 any kind of rules of evidence, and it's logically inconsistent

1 that I can consider that.

2 Okay, go ahead. What else have we got from this  
3 fellow? Anything else?

4 (Video resumed.)

5 THE COURT: Can somebody tell me who Mr. Gravel is?

6 MR. SCHEFF: Yes. Mr. Gravel, Your Honor, was  
7 in-house counsel to Bellicose and Sourcepoint.

8 THE COURT: To who?

9 MR. SCHEFF: Bellicose and Sourcepoint.

10 THE COURT: Okay.

11 MR. SCHEFF: Your Honor, the next witness is  
12 26 minutes, and then we have one other after that.

13 THE COURT: I thought you were going to cut some  
14 stuff out.

15 MR. SCHEFF: We did.

16 THE COURT: Are you familiar in your readings in  
17 history with water torture visited by -- I believe it was first  
18 envisioned as a method of punishment in China in about the 11th  
19 century. I thought maybe we had gone beyond that.

20 MR. SCHEFF: We're not trying to punish, Your Honor.  
21 So would Your Honor prefer that we play the next witness or  
22 take the afternoon break?

23 THE COURT: We'll take the afternoon break with a  
24 view to getting you to cut down some. A lot of this stuff is  
25 just not helpful. It's opinions from people who are not

1 qualified to render opinions. It's opinions on topics they  
2 can't render opinions on like the credibility of witnesses or  
3 the state of mind of somebody else. That's just not helpful to  
4 me in making decisions that need to be made.

5 The issue here is very simple: As to  
6 misrepresentations pointed out by the plaintiffs, what is the  
7 evidence as to whether they were true or not. That's what's  
8 the issue here. All right, we'll take 20 minutes.

9 (Recess taken.)

10 MR. SCHEFF: Thank you, Your Honor. We've completed  
11 our presentation.

12 THE COURT: Thank you very much. I think you've got  
13 enough. All right, I'm going to let you now address what you  
14 want to do. Mr. Bennett suggested something about briefing.  
15 First thing is I assume in the interim you talked to the court  
16 reporter and figured out when you're going -- we will get a  
17 transcript if you're going to tie things to the transcript.

18 MR. BENNETT: That would have been the wise thing to  
19 do, Judge.

20 THE COURT: You didn't do it. Here's the thing. We  
21 need to have this done quickly, because the brains of the  
22 operation won't be here for a whole lot longer.

23 MR. BENNETT: I understand.

24 THE COURT: It's going to be some work, I guess.

25 MR. BENNETT: So the --



1 THE COURT: Come to the lectern. Have you told Mr.  
2 Scheff what it is -- it's Scheff.

3 MR. SCHEFF: Yes, Your Honor.

4 THE COURT: I keep trying to put an I into it, but I  
5 know how to say it.

6 MR. SCHEFF: I understand.

7 THE COURT: Have you told Mr. Scheff what it is you  
8 think you want to do?

9 MR. BENNETT: I have, but generally what I had  
10 envisioned was rather than another brief that repeats all the  
11 argument was something more akin to a chart where we would  
12 identify the specific misrepresentations and then identify the  
13 parts of the record that we think address those.

14 THE COURT: You would have to identify the testimony,  
15 too.

16 MR. BENNETT: The testimony --

17 THE COURT: I don't mean cite to the transcript. I  
18 mean identify -- put the testimony where I can read it all in  
19 one document.

20 MR. BENNETT: So that is what I would imagine. I  
21 imagine all we'd be doing would be --

22 THE COURT: I understand. Mr. Scheff, do you agree  
23 with that approach?

24 MR. SCHEFF: Your Honor, I hadn't heard that or Matt.  
25 We had talked about short briefs. That's fine. We can do

1       that. I have no objection to that.

2               THE COURT: Now, I think you all followed basically  
3       the briefing in the structure of what you were talking about,  
4       you were following in your presentations the briefs that you  
5       had filed. I have something I need to get from you all,  
6       though. Maybe you all already know.

7               I've been checking the Fourth Circuit, and I've been  
8       checking the other record, and it says that the purchase price  
9       for Bellicose was \$300 million, and the question I don't know  
10      -- Ms. Kelly, I think, asked, she said \$300 million, and you  
11      objected to it and said that wasn't the price.

12              But the Fourth Circuit has -- and I think -- probably  
13      they took that from my opinion. I didn't go back and check my  
14      opinion -- held that the purchase price was \$300 million.  
15      Aren't we stuck with that as the price for whatever purpose  
16      there is or not?

17              MR. SCHEFF: I don't recall that from the Fourth  
18      Circuit opinion. I'd have to go back and read it.

19              THE COURT: I read it.

20              MR. SCHEFF: I have no doubt if Your Honor says that  
21      it's in the Fourth Circuit opinion that's what it says. I  
22      believe the document, the sales documents that are in the  
23      record use the phrase up to \$300 million, because the way the  
24      payment works is through a monthly payment, certain monthly  
25      payment which is not fixed. It's variable, and it can be zero.

1           And the note expires at a certain point in time --

2           THE COURT: Seven years.

3           MR. SCHEFF: Whether or not the 300 million has been  
4 paid or not. So the way it works is that if \$300 million was  
5 paid, just by way of hypothetical, within five years, there  
6 would be no further payments due under the note. If you got to  
7 the end of the seven years and 30 million had been paid, that's  
8 all that would be paid for the business.

9           THE COURT: Do you agree with that?

10          MR. BENNETT: Yes, Your Honor.

11          THE COURT: Then that takes care of that. What is  
12 the evidence of record as to who is it that establishes the  
13 loan criteria? That is, whether Payne, when he calls, can get  
14 a loan. I need to know what the record says about that. Coach  
15 Kelly is summonsing you, I assume.

16          MR. BENNETT: Probably to sit down, Judge. She's  
17 putting out something unrelated. Judge, we would have to  
18 organize different parts of the record that address that  
19 specific point.

20          THE COURT: I need to know the answer to that  
21 question.

22          MR. BENNETT: Yes, sir.

23          THE COURT: And that is, somebody has -- by that, I  
24 am essentially, I guess, asking for the underwriting factors  
25 that govern whether somebody can get a loan. That, to me, is

1 the loan criteria.

2 MR. BENNETT: Yes, sir.

3 THE COURT: That's what I mean by it. Is it set by  
4 Red Rock, Duck Creek Lending, Big Picture, Ascension, TED, Mr.  
5 Martorello? Who sets the criteria by which, when I pick up the  
6 phone and dial, I measure up to get a loan or not? And then  
7 the next part of it, is there any variability to that, because  
8 there are certain instances, for example if my credit score is  
9 800 I can get a loan, but if it's at 700 I can't get a loan,  
10 but if I'm willing to pay triple, I can get a loan or pay  
11 points.

12 That's how it ordinarily works in the banking  
13 industries. I want to know if there's any variability in the  
14 criteria that are set and who is it that has the authority to  
15 exercise that criteria. I need to know that.

16 MR. BENNETT: We're going to be challenged about the  
17 detail with regard to credit score, for example.

18 THE COURT: I don't mean for you to get into what the  
19 credit -- I was using that as an example. I'm saying, is there  
20 anything -- asking is there anything in the record that says  
21 here are the criteria that apply to the loans that are going to  
22 be made, and, if so, who is it that establishes those criteria,  
23 and that is you have to be over 25, you have to have a minimum  
24 income of X, you have to have no credit or a credit history of  
25 some kind, whatever it is. I don't know what they are.

1           It may just be that there aren't any criteria. If  
2   you pick up the phone, you breathe, and you are willing to pay  
3   600 percent interest, you can get a loan. I don't know.  
4   That's what I'm talking about, is the criteria for the loan and  
5   who is it that sets those criteria that the people who are  
6   processing the loans actually use to determine whether somebody  
7   is or is not going to get a loan. Do you understand?

8           MR. BENNETT: I do. I think we have to address some  
9   misconceptions that we've left Your Honor with, that is that  
10  there is an individual processing -- an individual as if you  
11  might have if somebody applies for a mortgage and you're  
12  weighing paper and looking at job, employment data or that type  
13  of thing.

14           These are lead-generated loans. That is, they hire  
15  -- in fact, they hire MicroBilt to go find prospective targets,  
16  and they prescreen those individuals on criteria that has not  
17  been, to my knowledge, revealed in the discovery.

18           THE COURT: I don't care what the criteria are. I  
19  want to know who sets those criteria.

20           MR. BENNETT: Yes, sir. We can present that  
21  evidence. I don't believe it was presented the last two days  
22  other than --

23           THE COURT: No, it wasn't, but it's referred to in  
24  some of the papers.

25           MR. BENNETT: Yes, sir.

1 THE COURT: Mr. Scheff, did you want to say anything  
2 about that?

3 MR. SCHEFF: Not in terms of the details. We'll comb  
4 the record and provide that information to the Court as well.

5 THE COURT: Make a separate filing.

6 MR. BENNETT: Yes, sir.

7 THE COURT: Caption it something creative or mundane,  
8 but have it -- statement of position respecting loan  
9 origination criteria would be sufficient.

10 MR. BENNETT: Yes, sir.

11 THE COURT: The other thing is in those charts that I  
12 was asking you to prepare about the corporate entities and  
13 trusts and everything, I need to know associated with that what  
14 is Mr. Martorello's interest in those particular entities, each  
15 particular entity so that I understand where he personally fits  
16 in as well to evaluate some of the testimony that's been given  
17 here.

18 So those -- in part of your charts you have that to  
19 be done. All right, now, when do you want to submit these  
20 summaries or summary charts of evidence based on the record  
21 made in the last two days?

22 MR. BENNETT: Your Honor, may we go off the record  
23 for a second?

24 THE COURT: Yes.

25 (Discussion off the record.)

1 MR. BENNETT: So if we're able to get the transcript  
2 Sunday, counsel believes ten days --

3 THE COURT: Huh-uh. Sunday is what day?

4 MR. BENNETT: 26th.

5 THE COURT: That puts it into August.

6 MR. BENNETT: Yes, sir.

7 THE COURT: Friday. You get it Sunday, file it  
8 Friday.

9 MR. BENNETT: Yes, sir.

10 THE COURT: That's as far as I'm willing to go on it.  
11 We can do some work in the meantime, but Friday is as far as  
12 I'm willing to go.

13 MR. BENNETT: May we have to that same date to submit  
14 the charts and the statement of position as well regarding the  
15 underwriting --

16 THE COURT: Can you get it earlier?

17 MR. BENNETT: We can. I don't want to throw my  
18 opponent under the bus.

19 MR. SCHEFF: We can as well, Your Honor.

20 THE COURT: It will help me to read and understand  
21 what you are doing if I get some of this stuff in increments  
22 instead of having to adjust it. Could you do it on Wednesday?

23 MR. SCHEFF: Yes, sir.

24 THE COURT: Wednesday will be the charts and the  
25 other information that I asked for.

1 MR. BENNETT: Your Honor, next Wednesday?

2 THE COURT: Wednesday will be the --

3 MR. SCHEFF: Wednesday, the 29th.

4 THE COURT: And that will -- you all are agreed on  
5 what the purchase price is. The charts showing the various  
6 corporate structures and trusts and Martorello's interest  
7 therein will be also on Wednesday, and then the evidence as to  
8 who sets the loan criteria statement will be due on Wednesday,  
9 and the other chart of what you've accomplished tied to which  
10 misrepresentation in these last two days will be on Friday.

11 MR. BENNETT: Yes, sir.

12 THE COURT: One other -- here's something I think you  
13 all need to focus on and I'm going to need to focus on. I need  
14 to really understand quite clearly what *Breakthrough* factor,  
15 what evidence relates to as it pertains to the analysis of the  
16 *Breakthrough* factor as presented by the Fourth Circuit, because  
17 that's the only way a misrepresentation can keep me from  
18 applying the Fourth Circuit's rules.

19 The Fourth Circuit evaluated all of the *Breakthrough*  
20 factors, and I've asked, in the original order for this hearing  
21 and the run-up papers, I asked that you tell me what was the  
22 effect of the misrepresentation on the Fourth Circuit's --  
23 applicability of the Fourth Circuit's opinion, and what that  
24 really means is -- I'm not quite sure was maybe the best way to  
25 say it, but it really is which of the misrepresentations



1     pertains to which *Breakthrough* factor as analyzed by the Fourth  
2     Circuit or other finding of the Fourth Circuit that you think  
3     it affects, specific finding, and then I have the basis for  
4     making the decision about, A, whether there's a  
5     misrepresentation and whether it pertains to the Fourth  
6     Circuit opinion in such a way as there's some way that the  
7     Fourth Circuit's opinion does not apply, because the way this  
8     whole thing got started, don't forget, is that you all made  
9     these statements that there had been a number of  
10    misrepresentations made to me and the Fourth Circuit, and Mr.  
11    Scheff said we believe that the analysis, several of the  
12    analyses in the motion to dismiss and the other papers are  
13    governed by the Fourth Circuit's opinion.

14           And you said, well, that's not the case because the  
15    Fourth Circuit's opinion was predicated on something that  
16    wasn't true, and, by the way, I think that same scenario  
17    occurred in another -- in a Fair Credit Act case you had  
18    before. I think it was *Soutter* where the Fourth Circuit didn't  
19    certify a class, sent it back down, and Equifax then admitted  
20    that what they told the Court, the Fourth Circuit, was  
21    incorrect, because in the proceeding on remand, the deposition  
22    was taken that proved that what they had said to the Fourth  
23    Circuit wasn't true.

24           And then there's case law in there that discusses  
25    what happens in that situation, and, in essence, what it means

1 is not that you jettison the Fourth Circuit decision, but the  
2 Fourth Circuit decision doesn't have any binding effect because  
3 of the misrepresentation.

4 Now, in this instance, there isn't any admission that  
5 there was a misrepresentation. I understand that. Do you  
6 remember the name of that case that I'm talking about?

7 MR. BENNETT: It was *Soutter v. Equifax*, Judge.

8 THE COURT: I had a written opinion on that. I don't  
9 know whether it was published or not.

10 MR. BENNETT: Yes, sir.

11 THE COURT: You all both might consult that. I  
12 regard any effort -- I regard it obligatory on a district court  
13 to follow the requirements of a Fourth Circuit opinion in a  
14 very serious way.

15 MR. BENNETT: Yes, sir.

16 THE COURT: So I certainly will require you all to  
17 adhere to the rules if I'm not --

18 MR. BENNETT: Yes, sir. If I could also note for the  
19 Court, of course, that the second argument for why the Fourth  
20 Circuit did not dispose of the claims regarding Mr. Martorello  
21 is the misrepresentation point. The first argument is that  
22 it's because the Fourth Circuit found something totally  
23 unrelated to whether Mr. Martorello is liable which is --

24 THE COURT: You are talking about the merits of the  
25 motion, his motion.

1 MR. BENNETT: The motion --

2 THE COURT: To dismiss.

3 MR. BENNETT: To dismiss, to apply the tribal  
4 immunity to a non-tribal defendant. The Court notes that we  
5 filed in this case our supplemental authority from two Fourth  
6 Circuit decisions yesterday, one of which we were opposite Mr.  
7 Scheff in a different matter, and in both of those decisions,  
8 the defendants were non-tribal entities, and the Fourth Circuit  
9 opinion as written by Justice Agee, or Judge Agee, found  
10 that -- and those were arbitration clauses were not enforceable  
11 because tribal law did not apply.

12 They both footnote, footnote one making the  
13 distinction between the defendants are not tribal defendants,  
14 those individuals have sovereign immunity, but that's not  
15 applicable here.

16 THE COURT: You say you filed something since then?

17 MR. BENNETT: We did. We filed supplemental --

18 THE COURT: This morning?

19 MR. BENNETT: This morning, yes, sir.

20 THE COURT: Those are Judge Lauck's two cases.

21 MR. BENNETT: They are. One, the appellant was Mr.  
22 Hanes, and the other appellant was Sequoia, but both of them  
23 were in the Gibbs district court case, and she was affirmed.

24 THE COURT: All right. Anything else, Mr. Scheff?

25 MR. SCHEFF: No. I don't think that Mr. Bennett has

1 characterized our position accurately, but we can deal with  
2 that in the papers.

3 THE COURT: That will be dealt with.

4 MR. SCHEFF: I understand.

5 THE COURT: What I was trying to direct your  
6 attention to is insofar as we're dealing with  
7 misrepresentations and the effect of the application of the  
8 Fourth Circuit decision to the motion to dismiss, and there's  
9 one other pleading, I can't remember what it is, that's been  
10 briefed, then there is authority about how that occurs and what  
11 can happen and what can't happen.

12 MR. BENNETT: Judge, respectfully, we have five  
13 minutes of counter designations, very short, for two of the  
14 depositions that you heard, very, we think, pointed and  
15 important testimony in each.

16 THE COURT: And do you have the designations in  
17 written form?

18 MR. BENNETT: We do.

19 THE COURT: We'll hear them then.

20 MR. BENNETT: Yes, sir.

21 THE COURT: I told you you could do that. You  
22 reserved some time.

23 MR. BENNETT: I believe we would have as our  
24 traveling witness Ms. Austin, and the examining lawyer would be  
25 Mr. Dillon.

1 THE COURT: That's not on videotape.

2 MR. BENNETT: Not on videotape, but they're short.

3 THE COURT: What you do is come be sworn and swear  
4 truthfully to read -- to read accurately that which is in the  
5 deposition transcript that you are reading. Raise your right  
6 hand and put it on the Bible.

7 Do you swear that you will truthfully and accurately  
8 read the deposition transcript that you're about to read?

9 MS. AUSTIN: Yes.

10 THE COURT: And you're going to give me a copy and  
11 the law clerk a copy as well? Do you have it in writing?

12 MR. DILLON: Yes, Your Honor, just one moment. I'm  
13 organizing, getting the papers for you.

14 THE COURT: We'll mark it as a plaintiffs' exhibit  
15 like we did the defendant. Is this from one witness or more  
16 than one witness?

17 MR. DILLON: Three witnesses, Your Honor.

18 THE COURT: As soon as we get that all accomplished,  
19 we'll make the record straight on that.

20 MR. DILLON: Your Honor, in terms of timing, I  
21 believe it's hopefully going to be about ten minutes or so.  
22 Two of these are fairly short. One of these we have a couple  
23 more designations.

24 THE COURT: Who are you reading?

25 MR. DILLON: So one counter designation are from the

1 deposition of James Dowd.

2 THE COURT: What plaintiffs' exhibit is that?

3 MR. DILLON: This plaintiffs' exhibit -- one moment,  
4 Your Honor. 140.

5 THE COURT: And the next one is?

6 MR. DILLON: Deposition of Karrie Wichtman.

7 THE COURT: And that is?

8 MR. DILLON: 141.

9 THE COURT: And the last one?

10 MR. DILLON: The deposition of Robert Rosette.

11 THE COURT: And you have copies of all those to give  
12 the clerk.

13 MR. DILLON: Yes. I gave the copies. And the  
14 Exhibit 142 for Mr. Rosette.

15 THE COURT: Yes, I know.

16 MR. DILLON: I'd like to start with the deposition  
17 for James Dowd.

18 THE COURT: All right.

19 MR. DILLON: All right. So our counter designations  
20 begin page 17, line six.

21 THE COURT: Go right ahead.

22 (Deposition transcript of James Dowd read.)

23 MR. DILLON: Next designation is page 19, line 17.

24 (Reading of deposition resumed.)

25 MR. DILLON: Your Honor, for our next counter

1 designation on page 75, this is a continuation of defendant's  
2 designations. This is paragraph 17 in defendant's  
3 designations. We're just continuing the next several  
4 subsequent lines.

5 THE COURT: What? I don't know what you are talking  
6 about. 75, line two through four. "Honestly, I don't work  
7 with that specific process very closely, so I think it would be  
8 better as to somebody else" is what's on my page.

9 MR. DILLON: So, Your Honor, the designation here  
10 from defendants, this was page 74, line 16, to page 75, line  
11 one.

12 THE COURT: I don't have that. I have page 75, and  
13 line one is not designated at all, and then I have lines three  
14 and four.

15 MR. BENNETT: Your Honor, this is our copy of the  
16 defendant's text of what they submitted in the record for Mr.  
17 Dowd, and this is a continuation starting at numbered paragraph  
18 17. The next lines after that text are what we are counter  
19 designating.

20 THE COURT: So this counter designates what? Say  
21 what it is.

22 MR. BENNETT: It's a counter designation expanding --

23 THE COURT: Here's the thing: It's a counter  
24 designation to the deposition of Dowd put on by the plaintiffs,  
25 defendant's exhibit whatever it is, entry number 19, page 82 to

1     whatever it is. That's what you put into the record and  
2     explains -- your counter designation is 75, lines two through  
3     four; is that right?

4             MR. BENNETT: Yes, sir.

5             THE COURT: That's how you do it.

6             MR. BENNETT: Yes, sir.

7             THE COURT: I'm not going to go through all that for  
8     you.

9             MR. DILLON: So beginning with defense designation  
10    starting at page 74, line 16.

11            THE COURT: What exhibit is that?

12            MR. DILLON: This is exhibit number --

13            MR. BENNETT: Judge, I don't have the exhibit number  
14    for Mr. Dowd's deposition. 328.

15            THE COURT: What?

16            MR. BENNETT: This is the counter designation to  
17    Exhibit 328 which was Mr. Dowd's original designation, and the  
18    two sentences we intend to read, the Court needs to be able to  
19    follow what the original text was because we believe that was  
20    incorrect.

21            THE COURT: I have 328 in front of me. What is this  
22    proposed counter designation on page 75 of plaintiff's  
23    Exhibit 140, where does it fit?

24            MR. BENNETT: It continues -- the next sentence after  
25    the end of this. So it says --



1 THE COURT: No, not this --

2 MR. BENNETT: Of and all that.

3 THE COURT: First let's get the entry number.

4 MR. BENNETT: Entry number 17, numbered paragraph 17.

5 THE COURT: Hold on. And that is page 74, line 16,  
6 to 75-01.

7 MR. BENNETT: Yes, sir. And the defendant stopped at  
8 75-01. We're going to read 75-2, three, and four so it will be  
9 complete.

10 THE COURT: I'm seeing Plaintiffs' Exhibit 140, page  
11 75, lines two through four. Is that right?

12 MR. BENNETT: Yes, sir.

13 THE COURT: Now I understand where this fits.

14 MR. DILLON: If Your Honor would like, I can reread  
15 defense designation just to provide context before we provide  
16 our counter designation.

17 THE COURT: I don't know what you are doing. Your  
18 next thing is on page 82.

19 MR. DILLON: Okay. For this designation, I'm going  
20 to reread from Defendant's Exhibit 328 to provide the context  
21 so Ms. Austin can provide our counter designation.

22 THE COURT: Take the 328 and tell me which entry you  
23 are talking about. It's got bold numbers there.

24 MR. DILLON: It's entry 17 beginning --

25 THE COURT: You just did that.

1 MR. DILLON: Okay. Then we'll continue -- the reason  
2 we wanted to read this was just to give context for this second  
3 portion because it was a continuation of the same response.

4 THE COURT: I understand, and I've made a note to see  
5 this particular next thing.

6 (Reading of deposition resumed.)

7 THE COURT: That is a counter designation to entry 17  
8 on DX-328.

9 MR. DILLON: Yes, Your Honor.

10 THE COURT: He says essentially what he's talking  
11 about in entry 17 he doesn't know about. All right.

12 MR. DILLON: Next counter designation is page 82,  
13 line one.

14 (Reading of deposition resumed.)

15 MR. DILLON: Next is page 83, line four.

16 (Reading of deposition resumed.)

17 MR. DILLON: Page 95, line 16.

18 THE COURT: There's a whole lot more underscored here  
19 on my copy.

20 MR. DILLON: Your Honor, I think that was a  
21 formatting error. Our designation cuts off on line 14 after  
22 "it works."

23 THE COURT: All right. Make sure that you mark an X  
24 through what you give the clerk.

25 MR. DILLON: Okay, yes, Your Honor. Make a note of

1 that. Next designation, page 95, line 16.

2 (Reading of deposition resumed.)

3 MR. DILLON: Your Honor, that's the end of our  
4 designations from the James Dowd deposition.

5 THE COURT: All right.

6 MR. DILLON: Next will be counter designations from  
7 Karrie Wichtman's deposition. I believe that's Exhibit 141.

8 THE COURT: What's her deposition exhibit?

9 MR. BENNETT: The original is 327, Your Honor.

10 THE COURT: All right.

11 MR. DILLON: Our first designation here, there are a  
12 few extra pages at the beginning of the document I handed to  
13 the Court. We're starting on page 212.

14 THE COURT: What was Mansfield's exhibit number?

15 MR. DILLON: One moment, Your Honor.

16 THE COURT: Mr. Scheff, do you know?

17 MR. SCHEFF: I do, Your Honor. 333.

18 THE COURT: And Wichtman is 327; right?

19 MR. DILLON: Yes, Your Honor. So our first counter  
20 designation, page 212, line 13.

21 (Deposition designations of Karrie Wichtman read.)

22 THE COURT: Wait a minute. What are you reading  
23 from?

24 MR. DILLON: This is page 212 --

25 THE COURT: You are talking about from Wichtman?

1 MR. DILLON: Yes, Your Honor.

2 THE COURT: First page I have is 161. The next one I  
3 have is page 193.

4 MR. DILLON: There were some formatting issues with  
5 the pages included, so there was some extraneous pages included  
6 at the beginning.

7 THE COURT: I have 184.

8 MR. DILLON: I believe it's the first five or so  
9 pages --

10 THE COURT: How many? Give me page numbers.

11 MR. DILLON: So page two --

12 THE COURT: 161 and then 183 through 186 come out; is  
13 that right?

14 MR. DILLON: Yes.

15 THE COURT: Everybody takes that out. Now you want  
16 to go back to page 212, you say?

17 MR. DILLON: Yes, Your Honor.

18 THE COURT: All right. I've got that now. Go ahead.

19 (Reading of deposition resumed.)

20 MR. DILLON: Next counter designation is on page 229,  
21 line 11.

22 (Reading of deposition resumed.)

23 MR. DILLON: A third designation, counter  
24 designations are from the deposition of Robert Rosette,  
25 Exhibit 142.

1 THE COURT: What is his; number 331?

2 MR. SCHEFF: That's correct.

3 MR. DILLON: Yes, Your Honor, 331.

4 THE COURT: Okay, and yours is PX-142.

5 MR. DILLON: Yes, Your Honor.

6 THE COURT: That's it?

7 MR. DILLON: Yes, Your Honor.

8 THE COURT: All right. Allergies, not COVID. Is  
9 that it?

10 MR. BENNETT: Yes, Your Honor.

11 THE COURT: Is there anything else we need to do?

12 MR. BENNETT: Not from the plaintiffs' perspective.

13 MR. SCHEFF: Not from Mr. Martorello's perspective,  
14 Your Honor.

15 THE COURT: Let's go off the record.

16 (Discussion off the record.)

17 THE COURT: We're discussing the suggestion that  
18 choice of law provision needs to be decided, and I need to  
19 figure out where it is. It's pleading number what, 379?

20 MS. KELLY: Judge, it is --

21 THE COURT: Come to the lectern, if you would.

22 MS. KELLY: If the Court recalls, the reason -- part  
23 of the reason we had this hearing was because in the briefing  
24 leading up to class certification, Mr. Martorello raised the  
25 defenses about the effect of the Fourth Circuit on the issue of

1 the class action waiver in his briefing for class  
2 certification.

3 And so we briefed that issue, and plaintiffs' brief  
4 is ECF 734, and in that brief, the arguments that are made deal  
5 with whether the class action waiver provision applies to Mr.  
6 Martorello. It also deals with whether the loan agreements  
7 prospectively waive federal law which is why we just filed the  
8 supplemental authority brief --

9 THE COURT: Wait a minute. Whether the loan  
10 agreement prospectively what?

11 MS. KELLY: Prospectively waives federal law, because  
12 the loan agreements require consumers to go through a dispute  
13 process under tribal law that we have asserted is --  
14 prospectively waives federal law, because the consumers don't  
15 have rights and remedies that be would available to them under  
16 federal law, because, for example, the tribal code does not  
17 allow a consumer certain damages --

18 THE COURT: Too much information right now. Your  
19 position is that the decisions yesterday from the Fourth  
20 Circuit help you in that analysis; is that what you are saying?

21 MS. KELLY: Yes.

22 THE COURT: They dealt with arbitration clauses.

23 MS. KELLY: It did, but in the decision as to the  
24 Sequoia defendant, which is the one that we filed, it also  
25 dealt with the tribal code, because if a consumer also had to

1 go -- the option, if they opted out of arbitration or if  
2 arbitration was unsuccessful, they would have to go through the  
3 tribal dispute resolution procedure.

4 THE COURT: Slow down.

5 MS. KELLY: Sorry. They would have to go through --  
6 a consumer would have to go through the tribal dispute  
7 resolution procedure, and in the case of Plain Green and Great  
8 Planes, which are related to the Think Finance enterprise, that  
9 tribal dispute resolution procedure was also -- is very similar  
10 to the Red Rock/Big Picture tribal dispute resolution  
11 procedure, and the Fourth Circuit found that the tribal dispute  
12 resolution procedure deprived a consumer of their federal  
13 rights and remedies and, essentially, prospectively waived  
14 federal law as the arbitration -- analogous to the arbitration  
15 prospective waiver doctrine that the Fourth Circuit has, you  
16 know, routinely rejected enforcing arbitration on that ground.

17 So we think the language and the Court's analysis  
18 looking at the tribal dispute resolution procedure in the Plain  
19 Green/Great Plain scenario and finding that the provisions of  
20 the rights and remedies available waiving prospective federal  
21 law helps our position in this brief. And we think that once  
22 the Court rules on this issue, it is essentially --

23 THE COURT: Rules on what issue?

24 MS. KELLY: The issue in ECF 734 with whether or not  
25 class, the class waiver is enforceable, because the analysis

1 essentially goes to the very heart of the case regarding choice  
2 of law. It's the same exact analysis, and so that would be the  
3 law of the case, and, from our perspective, the summary  
4 judgment or -- the loans would be illegal, these would be  
5 unlawful debts, and the case would essentially be over in our  
6 position.

7 THE COURT: But what you are asking is for me to look  
8 at and rule on the class waiver issue presented in his paper  
9 number what discussed in your paper number what and responded  
10 to in his paper number what?

11 MS. KELLY: So Mr. Martorello's brief was ECF 664.

12 THE COURT: What section of it are we talking about?  
13 He has a table of contents, I think, in the front.

14 MS. KELLY: The brief is addressing the effect of the  
15 Fourth Circuit's decision on the motion for class  
16 certification. In section one, Mr. Martorello asserts that the  
17 Fourth Circuit decision requires a finding that the class  
18 action waiver is valid and enforceable.

19 THE COURT: All right. And then you respond to that  
20 in?

21 MS. KELLY: In ECF 734, and we cite multiple reasons  
22 why we don't think it is enforceable.

23 THE COURT: And then you have supplemented that with  
24 a citation to one of the two cases yesterday?

25 MS. KELLY: Mr. Martorello did reply to our response



1 at ECF 781, and then we filed today, Mr. Guzzo filed it, a  
2 notice of -- motion for leave to file supplemental authority.  
3 It was filed today.

4 THE COURT: Is there any objection to the motion for  
5 leave to file the supplemental authority, Mr. Scheff?

6 MR. SCHEFF: Your Honor, I haven't seen the motion at  
7 all. I doubt there is, but at least I'd like the opportunity  
8 to take a look at the motion.

9 THE COURT: Seems reasonable to me.

10 MS. KELLY: Thank you, Judge.

11 THE COURT: Will you file something Friday, let me  
12 know whether you object to it, just that part of it?

13 MR. SCHEFF: Will do.

14 THE COURT: Thank you very much. We'll be in  
15 adjournment.

16  
17 (End of proceedings.)  
18  
19

20 I certify that the foregoing is a correct transcript  
21 from the record of proceedings in the above-entitled matter.  
22  
23

24 /s/  
P. E. Peterson, RPR

\_\_\_\_\_  
Date

25